Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

MULL & MULL, PLC,

Petitioner,

v.

RHONE-POULENC RORER, INC.;
BAXTER HEALTHCARE COMPANY;
ALPHA THERAPEUTIC CORPORATION; and
BAYER CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a court have subject matter jurisdiction or authority to certify a "settlement only" class and bind unnamed parties to a subsequently approved class settlement when it has previously been determined that no litigation class is possible?

2. Can the court's lack of subject matter jurisdiction or authority to bind unnamed parties to an unlawful class settlement be raised by such parties in defense to an injunction issued to command compliance with that settlement?

3. Are attorneys appearing solely in a representative capacity bound by a court order approving a settlement between their clients and a third party merely because they failed to object to the settlement in order to advance their clients' interests?

CERTIFICATE OF INTERESTED PARTIES

1) **Parties**

(A) Rhone-Poulenc Rorer, Inc.

(B) Bayer Corporation

(C) Baxter Healthcare Company

(D) Alpha Therapeutic Corporation

(E) Mull & Mull, A Professional Law Corporation

2) **Corporate Information**

(A) Rhone-Poulenc Rorer, Inc.

(i) Rhone-Poulenc Rorer Inc.'s parent is Rhone-Poulenc S.A.

(ii) No publicly held companies own 10% or more of the stock of Rhone-Poulenc Rorer Inc., except its parent Rhone-Poulenc S.A.

(B) Armour Pharmaceutical Company

(i) Armour Pharmaceutical Company's parent is Rhone-Poulenc Rorer International (Holdings) Inc.

(ii) No publicly held companies own 10% or more of the stock of Armour Pharmaceutical Company. Rhone-Poulenc Rorer, Inc., which owns 100% of the stock in Armour Pharmaceutical Company's parent Rhone-Poulenc Rorer International (Holdings) Inc., has issued shares of stock to the public.

(C) Bayer Corporation

(i) Bayer Corporation's parent is Bayer A.G.

(ii) Bayer A.G. owns 100% of the stock of Bayer Corporation.

CERTIFICATE OF INTERESTED PARTIES – Continued

(D) Baxter Healthcare Corporation

(i) Baxter Healthcare Corporation's parent is Baxter International, Inc.

(ii) Baxter International, Inc. owns 100% of the stock of Baxter Healthcare Corporation.

(E) Alpha Therapeutic Corporation

(i) Alpha Therapeutic Corporation's parent is Green Cross Corporation of America.

(ii) Green Cross Corporation of America owns 100% of the stock of Alpha Therapeutic Corporation.

(F) Mull & Mull

(i) Mull & Mull is wholly owned by Thomas and Lorraine Mull.

3) Law Firms

(A) Rhone-Poulenc Rorer, Inc.

(i) Sidley & Austin

(B) Armour Pharmaceutical Company

(i) Sidley & Austin

(C) Bayer Corporation

(i) O'Connor, Cohn, Dillon & Barr

(ii) Geoffrey R.W. Smith, Esq.

(D) Baxter Healthcare Corporation

(i) Dechert, Price & Rhoads

CERTIFICATE OF INTERESTED PARTIES – Continued

(E) Alpha Therapeutic Corporation

(i) Knapp, Petersen & Clarke

(F) Mull & Mull

(i) Barham & Arceneaux

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES: MAY IT PLEASE THE COURT:

Petitioner, Mull & Mull, respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit entered in this matter on October 29, 1998.

CITATION OF LOWER COURT OPINIONS

The district court order in this case, entered on February 18, 1998 in *Walker v. Bayer Corporation*, No. 96-C-5024 (N.D.Ill.), is unreported. It is reproduced in the Appendix attached hereto at App. 11-29.

The decision rendered by the United States Court of Appeals for the Seventh Circuit on October 19, 1998 in this case is reported at 159 F.3d 1016. It is also reproduced in the Appendix attached hereto at App. 1-9.

STATEMENT OF JURISDICTION

This is an appeal from an order entered by the United States District Court for the Northern District of Illinois on February 18, 1998 in *Walker v. Bayer Corporation, et al.*, 96-C-5024 (N.D.Ill.). Jurisdiction was based on 28 U.S.C. §1332. Mull & Mull appealed on February 24, 1998.

The United States Court of Appeals for the Seventh Circuit affirmed the district court decision on October 19, 1998. Co-appellants Roy Spece and Rose Ibanez timely petitioned for rehearing on November 2, 1998. The Court

of Appeals denied the petition for rehearing on November 4, 1998.

This Court has jurisdiction under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS

Article III, §2, Clause 1 of the United States Constitution provides, in relevant part:

> The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .

RECORD CITATIONS

The citations to the Appendix attached hereto are demarcated as "App. ___." Citations to the record before the lower courts are demarcated as "Mand. App. ___," referring to the appendix attached to the petition for writ of mandamus consolidated with these appeals in the United States Court of Appeals for the Seventh Circuit, and "R.App. ___," referring to the record on appeal.

STATEMENT OF THE CASE

In 1994, a group of plaintiffs in the multi-district litigation known as *In re Factor VIII Blood Concentrate Litigation*, then pending in the Northern District of Illinois, attempted to certify a litigation class to try their claims against the Fractionator-defendants. District Judge

John F. Grady agreed to certify a class to try the sole issue of the "ordinary negligence" of the Fractionators. *See Wadleigh v. Rhone-Poulenc Rorer, Inc.*, 175 F.R.D. 410 (N.D.Ill. 1994). The Fractionators vigorously opposed this certification, *see* App. 129 *et seq.*, and subsequently petitioned the Seventh Circuit Court of Appeals for a writ of mandamus to reverse that decision.

The Court of Appeals granted the petition and decertified the class. Important to its decision was the finding that the individual issues relevant to each case precluded the certification of a class even to try the limited issue of negligence. Judge Posner, writing for the Court, further opined that decertification insured that any settlement would reflect the economic and legal considerations relevant to each case, rather than producing a cookie-cutter settlement figure driven not by the concerns of the individual parties but rather by their mutual concern over the potential impact of a decision by a single fact finder. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299-1300 (7th Cir. 1995).

The prospect of facing hundreds of individual lawsuits did not sit well with the Fractionators. They began negotiations with Tom Mull (who represented more than one-third of the plaintiffs in the filed cases), and his client Corey Dubin, president of the Committee of Ten Thousand, a grass roots organization the district court had recognized as spokesperson for the hemophiliac community.

One of the Fractionators, Baxter HealthCare Corporation, ultimately agreed in principal to pay $50,000 to each HIV infected hemophiliac, plus $17,500 in attorneys' fees,

a proposal reflected in a draft settlement agreement sent to Mull for his review. But, before that deal could be closed, the remaining Fractionators, Alpha Therapeutic Corporation, Armour Pharmaceuticals, and Bayer Corporation, asked to participate, and after a series of meetings offered to Mull the prospect of a "global" settlement deal. Mull and Dubin informed the Fractionators that a "global" package was not the correct approach to resolve these cases, but were informed that they should wait to see the number ultimately offered, because it would be one they "could not refuse." Mull and Dubin told the Fractionators the number it would have to be at least "six-figures," or it would never have any prospect of selling in the community. *See* generally Exhibit 1 to Mand. App. G and Exhibits 10 and 11 to Mand. App. K.

Immediately thereafter, in the *Wall Street Journal*, the Fractionators announced a non-negotiable two-part settlement of $100,000 "net of attorneys' fees" to members of the hemophilia community (or their heirs) infected with AIDS as a result of their use of factor concentrate, and a $40,000,000 Cost and Fee Fund to be divided among the lawyers representing the class, conditioned upon the Fractionators' determination, after the close of the opt-out period, that a sufficient number of the filed lawsuits opted-in to the settlement class to make the deal economically attractive. The offer was formally extended, not to Mull and Dubin, but to the Steering Committee in the MDL, with the invitation that it become class counsel. The Steering Committee accepted both offers.

One problem remained – certifying what had previously been held to be an illegal "litigation class" as a "settlement class." When presented with the parties' joint

request to make such a certification, Judge Grady expressed "skepticism" about the viability of such a class in light of *Wadleigh*. *See* Exhibit 5 to Mand. App. G, at 15. The Judge was told that a "class action" was needed so that the Court could control attorneys' fees, a contention he found acceptable. *Id.* Extensive discussion also ensued at that time as to whether a "settlement-only" class was permissible under Rule 23 in light of the Third Circuit ruling in *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 625 (3rd Cir. 1996), *aff'd sub nom Amchem Prod., Inc. v. Windsor*, 521 U.S. 591 (1997). *Id.* at 26. Given the recent pronouncement of five judges of the Seventh Circuit that *Georgine's* castigation of "settlement only" classes enjoyed "general recognition," *Kamilewicz v. Bank of Boston*, 100 F.3d 1348, 1349 (7th Cir. 1996), *cert. denied*, 117 S.Ct. 1569 (1997) (Easterbrook, Posner, Manion, Rover and Wood JJ., dissenting) the proponents' concern was well-founded.

Apparently, all of the actors with an assigned role wanted the settlement class enough to ignore its illegality. The Fractionators joined forces with class counsel, and both encouraged the court to accept the settlement, without even discussing the risk of the scheme. So hurried was class counsel to push the deal, perhaps because of the Judge's admonition that they had best hurry in order to "slip [it] under the wire" before *Georgine* "pulled down the curtain" on their deal, *see* Exhibit 5 to Mand. App. G, at 26, that they filed a *Motion for Certification* the day *before* they even filed a complaint alleging the identical class claim disallowed in *In re Rhone Poulenc*. This nicety was presented to the Court after it noted the necessity of a vehicle through which its jurisdiction could be invoked. *See* R.App. 768, at 5-6. The selected class representative

was Susan Walker – a woman who admitted in open court that her claim was time-barred and that she could not expect relief from the Fractionators without a class settlement! *See* Attachment 17 to Mand. App. G, at 142.

The district court preliminarily certified the settlement-only class on August 14, 1996 – without conducting any Rule 23 inquiries as to fairness, numerosity, typicality or adequacy of representation – and without benefit of briefing or argument on any of these issues. It subsequently approved settlement of the "class claim" by Order entered on May 8, 1997, after the close of the opt-out period during which almost 6,000 persons, including the plaintiffs in approximately 1,000 filed lawsuits, had elected to participate. *See* Exhibit 2 to Mand. App. F. Three hundred of Mull & Mull's 450 clients, all with filed cases, had decided to "opt-in." In accordance with its obligations to these clients, Mull & Mull, on behalf of its clients, informed the district court that it did not oppose the settlement, although at least one formal opposition was filed which raised the specter of the impending *Georgine* affirmance. *See* R.App. 667. The Fractionators responded to these oppositions to the settlement with the contention that any attorney who represented any opt-ins had no standing to assert objections given that attorney's duty to the client. *See* R.App. 2, at 1.

As anticipated by the parties and the district court, this Court affirmed *Georgine* on June 25, 1997, *see AmChem Prod., Inc. v. Windsor, supra,* while appeals from the May 8 order were pending. The Fractionators dealt with the

obvious implication of *Amchem*, which was fully applicable to this case, *see Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993), by consenting to the relief demanded by the appellants, allowing them to exit the settlement class and become "opt-outs," without seeking or obtaining any judicial approval. This was done despite their prior representation on the record that a reopening of the opt-out period would jeopardize the settlement, *see* Mand. App. V at 112, and despite Judge Grady's previous characterization of such a suggestion by Mull & Mull co-counsel, Charles Kozak, as a "Rube Goldberg" invention. *Id.* at 153. The Fractionators' move was effective enough to bring dismissal of the appeals, thus precluding the Court of Appeals or this Court from directly considering the lethal effect *Amchem* had on the settlement. *See* Exhibit 16 to Mand. App. G.

Apparently unsure that the purchased "finality" of the May 8 order was not alone sufficient to protect their investment, the Fractionators concocted a "Rube Goldberg" invention of their own. They circulated a Release which they would demand that each claimant execute before concluding a settlement. This Release made it abundantly clear that, despite the purportedly "final" May 8 judgment, there was no settlement until each claimant executed the Release and submitted it to the Fractionators for approval. *See* App. 93 ("Whereas, in the absence of a fully executed Release from Releasors, Releasors will not receive payment under the Agreement or be entitled to any of the other benefits of the settlement . . . "); App. 97 ("receipt of such Settlement Consideration is conditioned upon" the receipt and approval of a signed release). The following paragraph completes the

distancing of the Release – and ultimately the claimants' settlement – from any "class settlement" made in the MDL:

> Releasors further represent and warrant that in agreeing to the terms of this Release, they have not relied on any finding of the fairness of the terms of the Agreement and/or this Release by any Court, including any determinations made by the Court in the *Walker v. Bayer Corp., et al.*, action in the United States District Court for the Northern District of Illinois or in the MDL proceedings pending in that same court. Rather, Releasors have reached their own decisions as to the fairness of the Agreement and this Release in consultation with counsel of their choice or have voluntarily elected not to consult with such counsel. Releasors also represent and warrant that they are not relying on the Court's order barring the filing or pursuit of individual claims and they would agree to the terms of the Release even if the Agreement were not part of a class settlement **but rather a completely private settlement.**

App. 101, at ¶14 (emphasis added). *Accord*, App. 93 (stating that the parties "now" desire settlement, indicating that no settlement had theretofore been confected, and App. 102, ¶18, where the Release states that it is the "entire agreement among the Parties hereto and that the terms of this Release are contractual, and not a mere recital.").

In recognition of the obvious importance of this newly-imposed settlement requirement, Tom Mull notified the Fractionators by letter of August 15, 1997 that no enforceable class action could be pending given *Amchem*.

He informed the Fractionators that their consistent efforts to proceed with any such settlement must reflect their intention to proceed with the 6,000 opt-in claimants on an individual settlement basis. His letter stated that the Rules of Professional Conduct required any communications with his clients to be channeled through his office. Finally, he indicated Mull & Mull's intention to assert its contractual rights to attorneys' fees against the Cost & Fee Fund and against the Fractionators personally where the Fund did not satisfy those rights. *See* Exhibit 7 to Mand. App. G.[1] Mull & Mull's counsel followed up this letter with one to each of the CEOs of the four Fractionators in which Mull & Mull's lien rights were reasserted. *See* Exhibit 13 to Mand. App. G. Mull & Mull also took steps to perfect its liens under Louisiana law.

On August 29, 1997, after Mull & Mull had notified them of the ramifications of *Amchem* and had advised them of the perfection of its lien rights, the Fractionators irrevocably committed themselves to completion of the settlement, without regard to any risk posed by *Amchem*. On that date, they deposited the settlement proceeds into

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[1] Contrary to the representation made by the Fractionators, Mull & Mull consistently asserted – in pleadings and in a hearing in open court on September 5, 1997 – that it never intended to assert a lien to be satisfied out of its clients' $100,000 settlements. Rather, Mull & Mull has always contended that the Fractionators are personally liable to the firm for one-third of the gross amount contemplated by a $100,000 net settlement – $50,000. Mull & Mull's "lien" creates a priority solely against the Cost and Fee Fund (or the vestiges of that fund) – which it contends represents an accounting of the fees that would otherwise have been paid to it – and against the Fractionators should that bank account not satisfy the fees.

an irrevocable Metropolitan Life trust account to be used to pay claimants. The Trust Agreement settling the Grantor Trust itself stated that the trust "is not being established pursuant to an order of, or being approved by, the United States, or any agency or instrumentality (including a court of law) of any of the foregoing and is not subject to the continuing jurisdiction of any such governmental authority." *See* Attachment to Mand. App. J. Article 10.11 of the Agreement provides that the situs of the trust is New Jersey. Consistent with its provision that the Trust was unrelated to the *Walker* settlement, Article 11.1 provides that the settlors and trustee agree that any actions in connection with the Trust Agreement will be brought or transferred to the United States District Court in New York, or if jurisdiction is lacking, to the New York Supreme Court.

On December 23, 1997, the Fractionators filed a *Motion to Adjudicate Liens*, asking that Judge Grady limit Mull & Mull's claims for fees to the Cost & Fee Fund – based on their asserted position that a valid class settlement still existed – and that the Court "warn" Mull & Mull that they would be sanctioned if they continued to press their contractual claims. *See* Mand. App. F. Mull & Mull opposed this request on the grounds that the May 8 Order was void, had been entered without jurisdictional authority and without any statutory basis, and was insufficient to support continuing jurisdiction over the claimants' attorneys. Mull & Mull additionally asserted that it was not bound by the May 8 class settlement Order

because the firm was not a party to that order.[2] It further contended that the issuance of the Releases and the execution of the Trust Agreement divorced the settlement of the claims from the May 8 class settlement. *See* Mand. App. "G". Therefore, the individual Releases signed by each of the claimants were subject to the contractual rights and lien obligations held by Mull & Mull as attorneys for the claimants.

One of those rights was the right to prosecute a tort and breach of contract action against the Fractionators. On January 6, 1998, Mull & Mull filed a lawsuit against the Fractionators in the 23rd Judicial District Court for the Parish of St. Tammany, Louisiana. That suit sought damages from the Fractionators for breaching their contract to pay the claimants' attorneys' fees, as well as for their interference with the contractual relations between the Mull firm and its clients. Mull & Mull did not seek to undermine the class settlement by this lawsuit nor to deprive any of the claimants of their $100,000 settlement proceeds. Indeed, Mull & Mull had previously filed a *Motion to Enforce* the settlement on behalf of those clients who had not been paid in accordance with the settlement agreement.

On February 18, 1998, Judge Grady issued an order granting the Fractionators' request for injunctive relief.

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[2] Judge Grady had expressed this view at a September 5, 1997 hearing, stating that the May 8 Order was not *res judicata* as to Mull & Mull because it was not a party to that Order. He did, however, state that the May 8 Order was "law of the case" and would govern his decision as to the allocation of fees. *See* Exhibit 12 to Appendix G, at 75.

That Order strongly rebuked Mull & Mull for asserting the voidness of the class action and held that Mull & Mull were equitably estopped from receiving any money outside the class action context. *See* App. 20. The district court made a cursory attempt to distinguish *Amchem* from *Wadleigh* by stating – months after the issuance of the Order – that he had previously convinced himself of the distinctions between the two. App. 18. It finally dismissed any objections based on distinctions between the Class Notice and the Release and held that said variations merely awarded the Fractionators the peace they had sought in reaching the agreement. App. 24.

Furthermore, the Court adjudicated several matters no one had ever brought before it at any time. Without notice or hearing, it enjoined Mull & Mull from asserting a right to attorneys' fees in any court in the country, immunizing the Fractionators both from contractual liability *and* from tort liability for abuse of process, intentional interference with contract, and conversion occasioned by their conduct during the putative class action. App. 27. It further abolished – again without notice or hearing – the contingency fee contracts Mull & Mull had with its clients, stating that the contracts "are of no force and effect" with regard to the division of the Cost & Fee Fund created under the "class settlement." App. 28. The district court thus created tort defenses for the Fractionators and vitiated contracts the validity of which it had never been asked to adjudicate.

The Seventh Circuit Court of Appeals affirmed the district court decision. The Court of Appeals' strongly-worded opinion recognized that it was "downright weird" that "*all* the members of the class should receive

the *identical* payment, even though the strength of their cases (some of which appear to be barred by the statute of limitations) and the amount of their damages must vary greatly." App. 4. It thus reiterated its assertion – previously made in *In re Rhone-Poulenc* – that aggregation of the claims into a lump settlement did not produce an accurate measure of their relative individual value. The decision further underscored that "the settlement embodied in the consent decree may well be questionable, both in its form and in its terms." *Id.*

Yet the Court of Appeals affirmed the district court decision in all respects. The Court of Appeals first held that Mull & Mull was equitably estopped from challenging the settlement at this time, because it had not objected to the settlement prior to its consummation. *See* App. 7. This rationale ignored the fact that Mull & Mull's fiduciary obligation to those clients desiring to accept the settlement (more than 300 of the 450) precluded it from challenging the validity of the settlement until the Releases replaced the settlement as the proceed disbursement mechanism. The Court further indicated that Mull & Mull's current objections, if sustained, would require the return of all money paid out by the Fractionators to-date. *See* App. 5. Finally, the Court of Appeals held that the potential that Mull & Mull could enforce its contracts against the clients justified the issuance of an injunction against it, *see* App. 9, despite Mull & Mull's repeated statements on the record that this would never occur, and that the St. Tammany petition invoked state law that made the Fractionators, not Mull & Mull's clients, liable for attorneys' fees.

REASONS FOR GRANTING CERTIORARI

I. The Seventh Circuit's holding that the May 8 order is immune from an Article III challenge resolves without meaningful discussion a timely, important issue of constitutional law of first impression, in a manner impossible to reconcile with previous precedent, leaving federal courts impotent to vindicate frauds perpetrated upon them.

Without discussion, the Seventh Circuit found that the district court met the requirements of Article III and that "there is no question of the district court's having exceeded its jurisdiction in entering the decree." App. 4. The Court further found that a lack of subject matter jurisdiction could not be raised at the present time because of the supremacy of the doctrine of finality. App. 5 (citing *Stoll v. Gottlieb*, 305 U.S. 165, 171 (1938); *In re Edwards*, 962 F.2d 641 (7th Cir. 1992)).

These holdings deprive Article III of its jurisdictional centrality. Recently, this Court considered whether the first question that must be addressed in any case is whether Article III jurisdiction is present, and whether there is a reservoir of "hypothetical" jurisdiction for a court to adjudicate issues absent an Article III foundation. *See Steel Company v. Citizens for a Better Environment*, 523 U.S. 83 (1998). The Court apparently agreed with Justice Scalia – writing for a plurality – that even the so-called "hypothetical jurisdiction" doctrine would not tolerate instances where "immaterial" claims were asserted "solely for the purpose of obtaining jurisdiction." 118 S.Ct. at 1010. This is perfectly consistent with *Stoll*. There, this Court expressly stated that the doctrine of "finality" may prevent relitigation of the court's jurisdiction, except

where there is an allegation of fraud in obtaining the judgment. *See* 305 U.S. at 172.[3] Indeed, even the Seventh Circuit was forced to concede that an "egregious" want of jurisdiction will authorize collateral attack. App. 5.

However, the "egregious" want of jurisdiction, of the "fraud upon the court" kind, is precisely what is at issue in this case. Despite the Seventh Circuit's rumination that the allegations of "fraud" were "groundless" as far as it could tell, App. 3, the record makes it clear that the only purpose of the invocation of Rule 23 was to manufacture federal jurisdiction to preside over a national "in globo" settlement. The Fractionators seized that federal jurisdiction to give the federal court the power to abrogate the class members' contracts with their attorneys and divert those fees to the Steering Committee in exchange for its agreeing to serve as "class counsel." The Fractionators admitted attorneys' fees to be the purpose of the selection of the class action vehicle under direct questioning by the district court. *See* Exhibit 5 to Mand. App. G, at 15. It would have been more honest for them to have filed a petition asking for judicial approval of a national settlement, although they had been admonished by the court

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[3] Additionally, *Stoll v. Gottlieb* concerned whether the Full Faith and Credit clause was implicated by the relitigation of jurisdiction in one forum after it had been fully and fairly adjudicated in another. This Court held that "since the question of subject-matter jurisdiction had been fully litigated in the original forum, the issue could not be retried in a subsequent action between the parties." *Durfee v. Duke*, 375 U.S. 106, 112 (1963). Here, the inquiry is whether in the absence of an Article III case or controversy, it can be said that the issue of jurisdiction was "fully and fairly adjudicated."

of the need for a petition that asserted a case and controversy in order to invoke its jurisdiction. The sham petition asserting a claim that was never intended to be litigated and which had already been determined to be illegal in *In re Rhone Poulenc*, is the very definition of a fraud upon the court.

But the fraud did not end there. After the class was certified, in order to insulate themselves from the very type of challenge that the Seventh Circuit has found impermissible, the Fractionators made every class member sign a Release as a precondition to confection of the settlement. The Release expressly stated that in concluding the compromise, the class member was not relying on the district court's approval of the settlement, was not influenced by the court's order barring the filing of suit, and consented to the settlement just as "if the Agreement were not part of a class settlement but rather a completely private settlement." App. 100. The settlement proceeds were deposited in a trust located in New York under a trust instrument that expressly disavowed that it was created to pay any class claims.

From start to finish, this "class action" was never anything more than a convenient fiction needed to give the district court jurisdiction to enforce a cumulated settlement of cases the aggregation of which the Fractionators had previously decried as impermissible and unnecessary when faced with the prospect of litigation. With no case and controversy in sight, however, the Fractionators were more than willing to not only consent to, but sponsor and pay for, a national "class action" because

it suited their purpose of obtaining protection from substantive state laws that served as an impediment to their desired "global" resolution.

Article III "limits the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *U.S. Parole Com'n v. Geraghty*, 445 U.S. 388, 396 (1980). "Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (citing *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988); *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)). The assertion of a fake claim for the purpose of securing federal jurisdiction, to secure relief not otherwise obtainable absent the exercise of federal power, is the very essence of the collusive feigned litigation that Article III was designed to prevent. This collusion is particularly egregious when both parties seek the same result – a decision that prejudices the rights of absent persons. *See, e.g., Moore v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 47 (1971); *Muskrat v. U.S.*, 219 U.S. 346, 359 (1911); *Cleveland v. Chamberlain*, 66 U.S. 419, 425 (1861). *See also Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 339 (1980). "[T]he federal courts lack authority to act in friendly or feigned proceedings." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 54 (1997) (citing *United States v. Johnson*, 319 U.S. 302, 304 (1943)) (absent "a genuine adversary issue between . . . parties," a federal court "may not safely proceed to judgment"). Any attempts to bring such a matter before the court represents an invitation to the court to abandon "the fundamental federal and tripartite character of our national

Government and . . . the role – restricted by its very responsibility – of the federal court." *Poe v. Ullman*, 367 U.S. 497, 503 (1961).

This Court should not tolerate what has transpired, for what is at issue here are not only the rights of private litigants, but the structure of the federal judiciary itself and its ability to safeguard its jurisdictional base. The thinly veiled "class action" at issue was an attempt to create a claims administration tribunal, with the power to enforce a global settlement of claims, having as its key feature the linking of claims too disparate to be cumulated for litigation purposes. The court's involvement was not to adjudicate any contested issue, but rather to lend its enforcement powers to facilitate achievement of the otherwise unobtainable goals of the PSC and the Fractionators with regard to the shifting of attorneys' fees from the class members' attorneys to class counsel. This is not an adjudicatory function. The constitutional power of federal courts cannot be defined, and indeed has no substance, without reference to the necessity "to adjudge the legal rights of litigants in actual controversies." *Liverpool S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885). *See also Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982).

It is the court, and most particularly this Court, that retains the prerogative to determine whether the role it is being asked to play is envisioned by Article III. "While the parties may be permitted to waive nonjurisdictional defects, they may not by stipulation invoke the judicial power of the United States in litigation which does not

present an actual 'case or controversy,' " *Sosna v. Iowa*, 419 U.S. 393, 398 (1975) (citing *Richardson v. Ramirez*, 418 U.S. 24 (1974)). Notions of "consent" or "waiver" do not hamstring the court in considering whether the capacity being assigned to it by the litigants is proper. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986).

Nor does any lack of diligence on the part of the mover prevent a court from declaring that a fraud has been perpetrated upon it, for such "involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." *Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. 238, 246 (1944). A collusive or feigned lawsuit, designed to secure an "adjudication" in the absence or any real case or controversy is such a fraud upon the court. Since it is not "in any real sense adversary," this type of suit "does not assume the 'honest and actual antagonistic assertion of rights' to be adjudicated – a safeguard essential to the integrity of the judicial process. . . . " *U. S. Johnson, supra*, 319 U.S. at 305 (quoting *Chicago & G.T. Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892)).

Another reason why the pretextual fraud which has been perpetrated upon the courts should not be tolerated is found in the "practical wisdom" that the Seventh Circuit lauds as supporting its decision – the pragmatism in pretermitting a serious Article III analysis because of the fact that the court was presented with a settlement *fait accompli*. Undisclosed by the Court of Appeals is the fact that the Fractionators voluntarily paid Mull & Mull's

clients, even after the district court had authorized a suspension of payment. This was done to forestall immediate review of the "class action," this time by mandamus petition contesting the suspension of payment. Thereafter, thousands of claimants were hurriedly paid as a result of the waiver of many of the administrative requirements that had previously been imposed by the Fractionators. There is no "practical wisdom" in rewarding the gamble taken by the Fractionators, unless there is practical wisdom in the aphorisms that one cannot fight City Hall or put a genie back in the bottle. What remains to be seen is whether there is "practical wisdom" in the Fractionators' hunch that skillful timing and the specter of a falling sky might in the end insulate their attempt to enlarge the jurisdiction of the federal courts in an unprecedented fashion.

The question of whether a court has the jurisdiction to enforce a class action claim that could not be litigated is not new to this Court. It pretermitted the issue in *Amchem*, in favor of a Rule 23 determination. *See* 117 S.Ct. at 2248. More recently, it has received oral argument in *Ortiz v. Fibreboard*, No. 97-1704, which also raises this issue. That case awaits disposition. Given that the decision in *Ortiz* may bear directly on the Article III challenge raised in this case, at a minimum, this Court should defer ruling on this case until after it renders its opinion in *Ortiz*. Thereafter, depending on the disposition, a remand to the Seventh Circuit for reconsideration of the question might be in order. However, if the Article III issue is pretermitted in *Ortiz* – as it was in *Amchem* – this case uniquely offers this Court a vehicle through which the obviously timely and ripe question can be resolved.

II. The Seventh Circuit's decision that *Amchem* could be avoided by manufactured finality is in direct conflict with *Amchem's* clear import, and relegates this Court's decision to the realm of procedural technicality, subject to avoidance by conduct of the parties such as waiver or stipulation. Writs should be granted to vindicate *Amchem* and to deter future attempts to circumvent it.

Due process requires that a class action judgment can only have binding effects on unnamed class members if they were adequately represented by persons whose interests were not in conflict with their own. *See Phillips Pet. Co., Inc. v. Shutts*, 472 U.S. 797 (1985). If adequate representation is prevented because of a conflict of interest, the judgment is not binding, regardless of its "finality." *See Epstein v. MCA, Inc.*, 126 F.3d 1235 (9th Cir. 1997); *In re Amer. Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996); *Kamilewicz*, 92 F.3d at 511; *Smith v. Babcock*, 19 F.3d 257 (9th Cir. 1994).

The essential teaching of *Amchem* is that "settlement classes" are not immune from these rules. Indeed, because of the great potential for conflicts of interest which might be concealed by collusion, and the court's inability to depend upon the balance adversity generates to inform its decision, settlement classes must be more carefully scrutinized. *Amchem*, 117 S.Ct. at 2248. Faithful adherence to all safeguards is required, not as a mere procedural technicality, but because the court lacks any power to do otherwise, constrained as it is by Article III, the Rules Enabling Act, and by Rule 23 itself, which reflects the demands of due process. *See Amchem, supra*, 117 S.Ct. at 2244. *See generally* Carrington & Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The*

Invalidity of Proposed Rule 23(b)(4), 39 Ariz. L. Rev. 461 1997.

The settlement class at issue amply demonstrates the "practical wisdom" (to borrow the Seventh Circuit's phrase) of *Amchem*. This class action was sought ostensibly at least by Susan Walker, a woman who admitted in open court that her only claim against the Fractionators was time barred, and therefore worth no more than any gratuity the Fractionators might bestow. Yet, she sought to represent persons not only like herself, but also those with viable and significant claims for the devastation that AIDS has wrought upon them and their families, claims large enough to justify individualized resolution, as the Seventh Circuit held in *In re Rhone-Poulenc, supra*. The conflict of interest is more than obvious, as the Fractionators noted in opposing certification of the *Wadleigh* class. *See* App. 138, 155. That this class action was as infirm as the *Georgine* class at issue in *Amchem* is conclusively demonstrated by the Fractionators' admission to this Court in their *amicus* filing in *Amchem* that affirmance of the Third Circuit's *Georgine* decision would invalidate the then pending *Walker* class. *See* Frac. Amicus in Dk. No. 96-207, at 2. Susan Walker could not possibly represent the 10,000 hemophiliacs she claimed to, a community whose ranks included future claimants whose claims were not yet ripe, those who unquestionably had timely filed suit, and some like the Louisiana plaintiffs who had the benefit of strict products liability laws supporting their claims.

Class counsels' conflict of interests were even worse. In a public statement issued in response to the settlement offer, Class Counsel eloquently explained: "the actual

written offer makes clear that among the thousands of victims who could participate, not more than 100 can decline to go along with the terms and conditions of the defendants' proposal. Otherwise, once again, the defendants can pull the plug." Mand. App. Attachment 6 to Exhibit K. Thus, Class Counsel was obliged, in order to represent its one client Susan Walker, to convince as many people as possible to accept this settlement, because every claimant that it advised to opt-out might be the one who would break the camel's back and spoil the deal for Walker.

Of course, spoiling the deal would not have only injured Walker – it would have devastated Class Counsel as well. After having lost the *Wadleigh* class action, the Steering Committee had no mechanism to generate a "common fund" fee pot from which to feed.[4] The promise of a $40,000,000 Cost and Fee Fund offered it considerably more than the assessments that might be levied against successful MDL cases. This is not to say that

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[4] Tom Mull was a member of the Steering Committee until he was removed by the court as a result of disagreements over litigation strategy and his attempt to convince the court to allow opt-ins to the Walker settlement an opportunity to change their minds due to allegations that the Steering Committee had failed to develop and promote the most powerful theory of liability he believes exists. The court disagreed with him, and removed him when it certified the class. Previously, he appeared as "of counsel" along with every other Steering Committee member on the *Walker* petition. He was not listed on any of the "settlement class" pleadings, such as the motion for certification, settlement approval, request for notice, *etc.*, all filed as part of the "one stop shopping" package by Class Counsel, which was limited to only two of the Steering Committee's members.

unbridled self-interest consciously motivated the Steering Committee in discharging its other role as Class Counsel. But, a carrot such as this (the promise of fees not otherwise obtainable) has been recognized to create such a potential conflict as to preclude constitutionally-acceptable representation. *See Epstein v. MCA, Inc., supra,* 126 F.3d at 1248-55.

In short, it is settlement classes such as this one that are precisely the object of *Amchem* 's exquisite wisdom. The Seventh Circuit was certainly correct in its assessment of this class settlement as "downright weird."

When a court exceeds its authority, and exercises a power it does not enjoy, the resulting judgment is void. This was the rule in the Seventh Circuit prior the instant decision, *see United States v. Indoor Cultivation Equipment,* 55 F.3d 1311, 1316-17 (7th Cir. 1995); *DDI Seamless Cyl. v. Gen. Fire Ext. Co.,* 14 F.3d 1163, 1166 (7th Cir. 1994). While an error in interpreting a statutory grant of jurisdiction may not render a judgment void, a judgment issued in the absence of any jurisdiction whatsoever, such as when a court enters an order completely beyond the scope of its authority, is void. *See, e.g., Crivello v. Michel,* 134 F.3d 831 (7th Cir. 1998), discussing Seventh Circuit and other law; *Jones v. Giles,* 741 F.2d 245, 247 (9th Cir. 1984) ("Absence of subject matter jurisdiction may render a judgment void where a court wrongfully extends its jurisdiction beyond the scope of its authority.").

This is not the case to retreat from these principles, because *Amchem* reinvigorates them in the "settlement class" context. The Seventh Circuit's cavalier dismissal of the issue of nullity relegates the *Amchem* principle to a

procedural hyper-technicality, instead of paying homage to its substantive significance. From *Hansberry v. Lee*, 311 U.S. 32 (1940) forward, it has been recognized that certification of a class action triggers serious constitutional concerns. *Amchem* teaches that meticulous adherence to Rule 23 is the only method by which these concerns can be satisfied, not only in the litigation class, but especially with regard to a "settlement only" class. That a settlement class was "slipped in under the wire" does not render the usurpation of power embodied in its certification in the face of a final determination that Rule 23 could not be invoked any less serious.

The Seventh Circuit's contrary conclusion paves the way for further expansions of judicial authority, justified by the "practical wisdom" of the doctrine of finality.[5] No case before could be found where parties have been allowed to avoid a direct Supreme Court pronouncement handed down while a case was on appeal by turning back the clock through a negotiated dismissal of the appeal in order to avoid application of this Court's edict. Indeed, it appears as if no one has even tried such a spurious gambit before, at least in the context of a decision by this Court which limits the very power and authority of the

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[5] Evasions of *Amchem*'s holding in the future could simply follow the model presented by the instant case, in the hope that there will be no timely objections lodged until "final" judgment, after which class counsel and the defendants will be home free. This is not an unrealistic expectation, given that in an "opt-out" class those who disagree with the class will simply opt-out, and thus have no standing to object, and if there are opt-ins who appeal, they can simply be allowed to exit the class, as occurred here.

court to act in order to avoid constitutional crisis. This is probably because such manipulation obviously constitutes an attempt to expand judicial authority and jurisdiction by stipulation and agreement between parties, which has never before been tolerated. It should not be tolerated now, not only for deterrent purposes, but also because to do so guts *Amchem* of its very soul.

Rule 10.1 recognizes that this Court may be called upon on occasion to grant certiorari, and review a decision, for no other reason than that the lower court has tolerated a gross departure from the accepted rules or so far sanctioned an impermissible course as to warrant exercise of its powers of judicial supervision. As Justice Stevens has noted, "as the Court of last resort in the federal system we have supervisory authority and therefore must occasionally perform a pure error-correcting function in federal litigation." *Florida v. Rodriguez*, 469 U.S. 1, 7 (1984) (Stevens, J., dissenting). *See, e.g., McNabb v. United States*, 318 U.S. 332 (1943). Exercise of such supervisory jurisdiction is particularly appropriate in this case, where to deny it would allow the offender to retain the benefit of the gross departure from accepted procedures, rewarding a patent wrong and encouraging further misconduct.

III. The Seventh Circuit decision holding that attorneys are personally bound as a result of their participation in a representative capacity is in direct conflict with this Court's holdings abolishing the duty to intervene, and creates dangerous precedent that should be immediately reversed.

The lower courts held that Mull & Mull – by acting as attorneys for certain putative class members – could

become bound by the resultant class settlement order. Yet the courts did not employ the traditional principles of *res judicata* and issue preclusion in determining the effect of the judgment on the Mull & Mull attorneys. *See* Exhibit 12 to Appendix G, at 75 (district court recognizing that the May 8 Order was not *res judicata* as to Mull & Mull because they were not parties to the litigation). Instead, they raised the concepts of equitable estoppel and waiver to a form of *res judicata*, holding that "having participated in the settlement proceeding and having failed to make timely objection to it, they are barred by the principles of waiver and equitable estoppel from challenging the settlement after it has become final." App. 7.

This holding creates a serious potential for grave harm, because it rewards an adversary's intentional creation of a rift in the attorney/client relationship. To understand this, one need look no further than the plain import of the Seventh Circuit's decision. On the one hand, Mull & Mull is severely castigated for jeopardizing its clients' interests, and on the other it is denied relief because it did not assert the claim that allegedly threatens its clients sooner than it did.

No conflict of interest existed before the defendants sought to interdict state law which prevented the Fractionators from seeking to lessen their liability for attorneys' fees in a "net of fees offer" by asking the *client* to agree to a cap on fees. Compare *Evans v. Jeff*, 475 U.S. 717 (1986) (where this Court approved of such an arrangement in a statutory fee shifting case, because there, as opposed to a contingency fee case, the fee belongs to the client, not the lawyer and a fee waiver was consistent with congressional intent). Thereafter, when the clients'

settlement was hinged upon the Cost and Fee Fund feature of the settlement, no attorney could object to the Cost and Fee Fund feature, or oppose the settlement on his or her own behalf, if the Settlement Fund portion of the settlement was in the client's best interest or desired by the client. At least one attorney who tried to do so prior to settlement approval was criticized by the Fractionators as acting adversely to his client's interests. *See* R.A. 2, at 1.

Attorneys should not be punished, as have Mull & Mull, for trying to negotiate such a mine field. They should be allowed to zealously represent their clients in their capacity as attorney, with the knowledge that at some later date, when their clients' interests are no longer at issue, they can then do what is required to protect themselves.

The Court of Appeal's contrary rule ignores the well established rule that no one is required to defend, or appear, in litigation unless named as a party – there is no estoppel unless there is a duty to appear. *See Martin v. Wilks*, 490 U.S. 755, 761 (1989). *See also Richards v. Jefferson City*, 517 U.S. 793, 797, 116 S.Ct. 1761, 1765 (1996). Where parties settle their disputes extrajudicially, they cannot deprive non-parties of their rights, or impose on them "duties or obligations," without joining those parties and giving them the opportunity to be heard in a meaningful manner. *Local No. 93 v. Cleveland*, 478 U.S. 501, 529 (1986). Those non-parties have no duty to intervene in the litigation and can rest assured by non-intervention that only those judgments in which their rights are adequately represented will in fact bind them. *See Chase Nat. Bank v. Norwalk*, 291 U.S. 431 (1934).

These rules are not bent when one party appears in a case in a purely representative capacity. A judgment cannot have effect against a non-party, "even when the party in question is present in the case in some other capacity." *Rossi v. Boston Gas Co.*, 833 F. Supp. 62, 68 (D.C. Mass. 1993) (citing *Bender v. Williams Port Area School District*, 475 U.S. 534 (1985)). "*Res judicata* does not apply when the parties appear in one action in a representative capacity and in a subsequent action in an individual capacity." *Tank v. Southern Methodist Univ.*, 116 F.3d 775, 776 (5th Cir. 1997), quoting *Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183, 188 (5th Cir. 1990). *See also*, Restatement (Second) of Judgments § 36(2) (1982) ("A party appearing in an action in one capacity, individual or representative, is not thereby bound by or entitled to the benefits of the rules of *res judicata* in a subsequent action in which he appears in another capacity."). Thus, adjudication of a clients' rights is not binding on an attorney merely because he or she is counsel of record. *See Fleming v. Lake Delton Dev. Corp.*, 241 F.2d 865, 866 (7th Cir. 1957), *cert. denied*, 355 U.S. 821 (1957). *See also Britton v. Seale*, 81 F.3d 602, 606 (5th Cir. 1996); *U.S. v. Schwimmer*, 968 F.3d 1570, 1578 (2nd Cir. 1992). The imposition of a duty upon attorneys appearing in a representative capacity to simultaneously represent their own interest in order to prevent estoppel by judgment announces a dangerous rule warranting this Court's immediate consideration.

CONCLUSION

For the foregoing reasons, Mull & Mull respectfully asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit and reverse that court's decision to vitiate Mull & Mull's contingency fee contracts and liens and to enjoin Mull & Mull from prosecuting its state court tort and breach of contract suit against the Fractionators.

Respectfully submitted,

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In the
United States Court of Appeals
for the Seventh Circuit

Nos. 98-1438 and 98-1770

IN RE FACTOR VIII OR IX CONCENTRATE BLOOD PRODUCTS LITIGATION,

APPEALS OF ROY G. SPECE, JR., ROSE MARIE IBANEZ, and MULL & MULL.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 96 C 5024 – **John F. Grady**, *Judge*.

No. 98-1629

IN RE MULL & MULL.

Petition for a Writ of Mandamus.
No. 94 C 5324 – **John F. Grady**, *Judge*.

SUBMITTED SEPTEMBER 8, 1998 – DECIDED OCTOBER 19, 1998

Before POSNER, *Chief Judge*, and BAUER and ROVNER, *Circuit Judges*.

POSNER, *Chief Judge*. Five years ago, a nationwide class action was filed on behalf of hemophiliacs who had been infected in the early 1980s with AIDS virus (HIV) contained in blood solids manufactured and sold by the

defendant drug companies for the treatment of hemophilia. Blood solids are manufactured from blood sold or donated to blood banks and the defendants had failed either to screen the blood for HIV or to process the blood in a way that would kill any HIV in it. The class claimed that the defendants were negligent in not taking these precautions. After we granted mandamus, on grounds unnecessary to recite here, to decertify the class, *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995), the parties' lawyers continued to negotiate over a mass settlement of the estimated 6,000 suits that either had been or were expected to be filed by or on behalf of infected hemophiliacs. The negotiations resulted in the certification of the class, though this time for settlement only, and the entry, last year, of a consent decree. The decree provided that each member of the class who was willing to release the defendants from liability would receive $100,000 net of attorneys' fees and that the defendants would establish a $40 million fund out of which attorneys' fees would be paid in amounts to be determined by the judge. The decree extinguished the rights of the lawyers for those class members who signed a release to enforce their contingent-fee contracts with such members, because it provided that "no attorney's fee shall be payable by any class members other than those fees approved by the Court to be payable from the [$40 million] fund." Contingent-fee contracts generally entitle the lawyer to 33 to 40 percent of any judgment or settlement. In the case of a settlement that yielded a net of $600 million to the claimants, this would mean lawyers' fees of $300 to $400 million (since a gross settlement of $900 million would yield the claimants $600 million if their

lawyers were entitled to 33 percent), not $40 million, actually less than $40 million since the fund was to be the exclusive source of court costs as well as attorneys' fees.

The few appeals from the consent decree were voluntarily dismissed. The process of obtaining releases from members of the class began and is now substantially completed, with some 5,200 class members having executed releases and been paid $100,000 each. Several hundred of these class members are represented by the lawyers who have filed, on their own behalf and not on behalf of their clients, the two appeals and the petition for mandamus that are before us for decision today.

These lawyers accuse the lawyers for the class and for the defendants – groundlessly, as far as we can tell – of defamation, bait-and-switch tactics, hoodwinking, infamy, dishonesty, illegality, intimidation, extortion, hypocrisy, hysteria, and Marxism. Yet they did not oppose the settlement. They objected initially to the amount of the settlement but their objection was rejected after a hearing and they did not renew their opposition or appeal from the consent decree, of which their clients have, as we have noted, taken full advantage. And at no time did they object to the attorney's fee provision of the settlement. Only after the time for appealing from the consent decree had run did these lawyers advise the district court of their view that the consent decree was invalid insofar as it limited their fees and barred them from trying to enforce their contingent-fee contracts with their clients. They also instituted collateral attacks on the settlement in the state courts of Louisiana, which resulted in a temporary cessation of payments by the defendants to the clients of these lawyers. The district judge

responded to these shenanigans by enjoining the lawyers from attempting to enforce their contingent-fee contracts or liens based upon them, and he declared the contracts void to the extent that they are inconsistent with the consent decree. The lawyers have challenged his actions both by appealing and by seeking mandamus.

The injunction is appealable without regard to finality, 28 U.S.C. § 1292(a)(1), and if the appellants are correct that the consent decree is "void," then the injunction, being ancillary to it, would fall with it. If the consent decree were truly void, the injunction based on it would presumably also be void, and so unappealable because a void order imposes no obligations; but in that event mandamus would lie to vacate the injunction. *DDI Seamless Cylinder Int'l, Inc. v. General Fire Extinguisher Corp.*, 14 F.3d 1163, 1166 (7th Cir. 1994). The settlement embodied in the consent decree may well be questionable, both in its form (cf. *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997), disapproving "settlement classes," albeit in different circumstances from those of this case) and in its terms. That *all* the members of the class should receive the *identical* payment, even though the strength of their cases (some of which appear to be barred by the statute of limitations) and the amount of their damages must vary greatly, is downright weird. But there is no question of the district court's having exceeded its jurisdiction in entering the decree. All the requirements of Article III were satisfied.

Even if they had not been, it is unlikely that the settlement could be set aside at this late date. The appellants argue that "when subject matter jurisdiction is lacking or due process has been denied, the final judgment is

void, and its nullity must be recognized in any collateral proceeding in which it is asserted as binding." This is an overstatement. The principle that jurisdictional defects may be noticed at any time is limited, as we explained in *In re Edwards*, 962 F.2d 641, 644 (7th Cir. 1992), by the equally important principle that litigation must have an end. After a case has become final by exhaustion of all appellate remedies, only an egregious want of jurisdiction will allow the judgment to be undone by someone who, having participated in the case, cannot complain that his rights were infringed without his knowledge. *Stoll v. Gottlieb*, 305 U.S. 165, 171-72 (1938); *In re Edwards*, *supra*, 962 F.2d at 644; *Restatement (Second) of Judgments* § 12 (1982). (On the significance of participation, see, e.g., *Williams v. General Electric Capital Auto Lease, Inc.*, No. 97-1321, 1998 WL ___, at *___-___ (7th Cir. Oct. 2, 1998).)

The practical wisdom of this rule is shown by the present case. The defendants have paid out more than $500 million. Are they now to go around to all 5,200 class members whom they have paid and ask for their $100,000 back so that this litigation can return to its starting point? Not that the appellants are asking for this. They just want more fees. But the $40 million cap on attorneys' fees was an important part of the deal from the defendants' standpoint, given their commitment to pay each class member a net of $100,000, so that the attorneys' fees would have to come out of the defendants' pockets. If the cap is to be lifted the entire settlement must be rescinded and the parties returned to square one by the return of the moneys paid out under it. This would also have to happen if the appellants decided to seek additional fees not from the defendants but from their own clients; the

defendants wouldn't care, but of course the clients would be entitled to rescind their releases, which had been premised on the receipt of $100,000 net.

We are mindful that Fed. R. Civ. P. 60(b)(4) authorizes, and the cases interpreting it require, "void" judgments to be set aside at any time. *United States v. Indoor Cultivation Equipment*, 55 F.3d 1311, 1317 (7th Cir. 1995); *Bally Export Corp. v. Balicar, Ltd.*, 804 F.2d 398, 400 (7th Cir. 1986). But set aside *by the district court*; it is there that the motion must be filed; and the appellants have never filed such a motion. But we don't want to give them false hopes. They will gain nothing by trying to file such a motion in the future. For "void" is just the name we give to those judgments that can be set aside without regard to the usual limitations on challenging judgments after they have become final by exhaustion of appellate remedies; and as the authorities cited in the preceding paragraph make clear, a judgment is not to be pronounced void merely because the court that entered it may not have had jurisdiction. And, needless to say, substituting for a 60(b)(4) motion in the district court a petition for a writ of mandamus in the court of appeals (cf. *Cohen v. Illinois Institute of Technology*, 581 F.2d 658, 662 (7th Cir. 1978); *Cinerama, Inc. v. Sweet Music, S.A.*, 482 F.2d 66, 71 n. 3 (2d Cir. 1973) (Friendly, J.)) shouldn't enlarge the meaning of "void." Indeed, given the rule, the only occasion for using mandamus – a last resort, a safety hatch where no other vehicle for obtaining judicial relief is available, e.g., *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980) (per curiam) – to get rid of void judgments would be where Rule 60(b)(4) relief had been sought in the district court and denied there, and the order denying it was

unappealable, as in *Moses v. Banco Mortgage Co.*, 778 F.2d 267, 275 (5th Cir. 1985). That is not this case.

Rule 60(b)(3) allows judgments to be set aside on the ground of fraud, and the appellants argue that the settlement was procured by fraud. But this rule (unlike 60(b)(4)) has a time limit of one year, which the appellants have now exceeded, for as we have said they never filed a Rule 60(b) motion, and so it is now too late for them to file such a motion bottomed on subsection (3). Anyway their allegations of fraud are fantastic and even preposterous. The most fantastic is the claim by one of them that he was on the verge of negotiating a $1.8 billion settlement with the defendants when the class lawyers by a dastardly maneuver preempted him by agreeing to accept a measly $600 million. If this were true, which we do not for a moment believe, the lawyer would have been ethically obligated, as well as impelled by powerful motives of self-interest, to bring this to the attention of the district judge in the hearing that the judge conducted (and the lawyer attended) on the fairness of the proposed settlement.

Even if *someone* might have been or might still be able to challenge the settlement, presumably someone who had not had notice of or a fair opportunity to participate in the proceeding yet had been adversely affected by it, it is not these lawyers. Having participated in the settlement proceeding and having failed to make timely objection to it, they are barred by the principles of waiver and equitable estoppel from challenging the settlement after it has become final and the defendants have paid and the class members have received hundreds of millions of

dollars. *Skelton v. General Motors Corp.*, 860 F.2d 250, 259 (7th Cir. 1988).

Since the settlement stands, the judge's power to issue the injunction (and related declaratory relief) against these lawyers' enforcing the contingent-fee contracts or liens based upon them was a proper exercise of the court's jurisdiction under 28 U.S.C. § 1651 ("all writs") to prevent interference with its orders. E.g., *United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977); *Williams v. General Electric Capital Auto Lease, Inc.*, *supra*, at *___; *United States v. Silva*, 140 F.3d 1098, 1103 (7th Cir. 1998); *In re VMS Litigation*, 103 F.3d 1317, 1324 (7th Cir. 1996); *In re Agent Orange Product Liability Litigation*, 996 F.2d 1425, 1431 (2d Cir. 1993). The settlement agreement guaranteed all acceding class members $100,000 free of attorneys' fees. The appellant lawyers are now claiming the right to sue their clients for a third or more (whatever the contingent-fee contract provides) of the $100,000. This claim is not only a dagger aimed at the heart of the settlement and therefore properly enjoinable; it raises serious ethical concerns. Having induced their clients to sign releases under the impression that the consideration for the release was $100,000 net, the lawyers now assert a right to turn on the clients and take for their own benefit a substantial fraction of that purportedly net recovery. It is true that they *don't* want to sue their clients, or even to undo the settlement; they would be quite content to take the $15 million or so that they think their contingent-fee contracts entitle them to out of the $40 million costs and attorneys' fees fund, and indeed would greatly prefer this route to having to sue hundreds of individuals. But if they did get what they are seeking

out of the fund, the settlement would come apart, to the detriment of their clients, because there wouldn't be enough money for the other lawyers. In any event, the appellants' insistence that notwithstanding the consent decree the contingent-fee contracts remain valid and enforceable – which means enforceable against the clients who signed them – created a sufficient danger to the clients (as well as causing the delay in payment to them that we mentioned earlier) to warrant the district court's enjoining these lawyers from trying to enforce the contracts.

The order of the district court is

AFFIRMED.

A true Copy:
Teste:

_____
Clerk of the United States Court of Appeals for the Seventh Circuit

No: 96cv5024 Walker v. Bayer Corp, et al

2/18/98	80	MINUTE ORDER of 2/18/98 by Hon. John F. Grady: (1) The motion of Mull-Kozak to enforce settlement is denied; [55-1] (2) the motion of Spece-Ibanez for an order rescinding release provisions exonerating government bodies and for other relief, including discovery on the issue of fraud is denied; [52-1] (3) the motion of defendants for adjudication of liens is granted; and (4) the motion of defendants for enforcement of the Order of 05/08/97 is granted. (See attached memorandum opinion for further provisions) Enter memorandum opinion. Mailed notice (hp) [Entry date 02/25/98]

[96-5024.981] February 18, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE	)	MDL-986
FACTOR VIII OR IX CONCENTRATE BLOOD PRODUCTS LITIGATION	)	
SUSAN WALKER, Administratrix of the Estate of Steven Walker, Deceased,	)	THIS DOCUMENT RELATES TO:
Plaintiff,	)	
v.	)	
BAYER CORPORATION, et al.,	)	No. 96 C 5024
Defendants.	)	

ORDER CONCERNING CERTAIN CLAIMS FOR ATTORNEYS' FEES

On May 8, 1997, this court entered an order approving the class settlement in this case. The basic elements of the settlement are that each claimant group will receive a payment of $100,000, net of attorneys' fees. The settlement provides for a $40 million cost and fee fund to be contributed by the defendants, which will be the exclusive source of any payments to class members' attorneys for their fees and costs.

The court had held day-long fairness hearings on the proposed settlement in November of 1996 and April of 1997. At these hearings, anyone wishing to be heard in favor of or in opposition to the settlement was given an

opportunity to speak. A number of attorneys for class members were present at these hearings. They included Charles R. Kozak, Thomas W. Mull and Roy G. Spece, Jr., who represent several hundred class members. At the November hearing, none of these attorneys expressed any objection to the settlement. Later, Messrs. Kozak and Mull wrote to the court expressing concern over the amount of the settlement and accusing class counsel of having overlooked liability theories which, if asserted, would have resulted in a larger settlement offer from the defendants. This correspondence was the occasion for the additional fairness hearing in April of 1997. At that time, the court heard fully from Mr. Kozak and found that there was no merit to his and Mr. Mull's assertion that class counsel had failed to take adequate account of every theory that would lend strength to plaintiffs' negotiating position. After further consideration, the court entered the Order of May 8th approving the settlement.

The importance of the foregoing history for present purposes is that neither Mr. Mull, Mr. Kozak nor Mr. Spece, nor attorney Rose Ibanez, (who, in association with Mr. Spece, represents a number of class members) made any objection to the *attorneys fee* aspect of the settlement. The only objection made by any of them to any part of the settlement was the objection by Messrs. Mull and Kozak that the $100,000 payment to each class member was too small, due to class counsels' alleged failure to emphasize the alternate liability theories favored by Messrs. Mull and Kozak. Notwithstanding these reservations about the amount of the settlement offer, Messrs. Mull and Kozak made it clear that they

were *not* asking the court to reject the settlement (a position the court found somewhat difficult to understand), but were instead urging the court to approve the settlement for class members who desired to accept it. Mr. Spece also urged that the settlement be approved.

The Order of May 8, 1997 stated that it was final and appealable and the court's intention to make it final and appealable was understood by all the attorneys who had participated in the settlement, including Messrs. Mull, Kozak and Spece and Ms. Ibanez. Although several non-party class members did file appeals, the grounds asserted did not challenge the attorneys fee provision of the settlement and those appeals were eventually dismissed by agreement. No attorney filed any appeal challenging the limitation of attorneys' fees to amounts determined by the court to be payable from the $40 million fund.

The Order of May 8 directed the parties to proceed with implementation of the settlement, which has been occurring since that time. The process has turned out to be considerably more complicated and time-consuming than anyone anticipated. The settlement agreement recognized that the only way class members could realize a net payment of $100,000 was through waiver of subrogation and reimbursement liens that might be asserted against the settlement proceeds by the federal government, all 50 state governments, and a number of insurance companies based upon the medical benefits they had provided to class members. In many instances, the amounts of these liens would have wiped out all or a substantial part of a class member's settlement with the defendants. In recognition of this problem, the settlement agreement provided

that it was conditioned upon the resolution of all subrogation claims to the parties' "mutual satisfaction." The defendants carried on extensive negotiations with the various lien claimants and kept the court advised of their progress. As a result of these efforts, the federal government, all states, and the major insurance companies have provided waivers of any claims for reimbursement. This aspect of the settlement, therefore, has been successfully completed. The defendants had to pay the lien claimants for these waivers ($30 million to the federal government), which has added to the cost of the settlement from the defendants' standpoint.

Another implementation problem has been the matter of obtaining the necessary releases from persons who might have claims against the defendants arising out of the subject matter of this litigation. Signatures of class members and their spouses are obvious enough, but the variations in state law as to who might be able to sue, and when, have caused misunderstandings and delays that were not foreseen at the time the court approved the settlement. The agreement provides that necessary releases will be obtained, but does not set forth specifics. Questions have arisen concerning the need in some cases for the signatures of children, parents, siblings and former spouses. The court has received a large amount of correspondence from opt-in class members expressing disappointment, even bitterness over what they regard as unreasonable requests by the defendants for unnecessary signatures. What has become clear, however, is that signatures of some rather surprising people are sometimes required in order to protect the defendants from the possibility of future litigation in regard to a class member,

even when that class member signs a release. For example, if the class member dies of his HIV infection after signing the release and receiving the settlement money, the laws of some states would permit a wrongful death action to be brought by the next of kin of the class member, despite his having given a release during his lifetime. The theory is that upon his death a new cause of action arises which the decedent would not have had the power to release during his lifetime.

The defendants have found it necessary to retain counsel to advise them about the requirements for valid and effective releases in each of the 50 states, and they have adopted a policy of waiving signatures determined not to be necessary in light of this advice. Class counsel is involved in attempting to obtain waivers where appropriate, and counsel has not complained to the court that the defendants are insisting upon signatures or procedures (e.g., state court approval in regard to minors) that are unnecessary.

One of the things the federal government insisted upon in return for the waiver of its reimbursement claims is that the releases obtained from the class members include the federal government as a releasee. The government was unwilling to release its claim for reimbursement if it might later be sued by a class member.[1]

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[1] The releases also relinquish claims against state governments which waive their right to reimbursement.

I. THE ASSERTION OF CLAIMS FOR CONTINGENT FEES BY ATTORNEYS MULL, KOZAK, SPECE AND IBANEZ[2]

The occasion for this opinion is that Messrs. Mull, Kozak and Spece and Ms. Ibanez now take the position that they are entitled to collect the one-third contingent fees provided for in their retainer agreements with the opt-in class members they represent.[3] These attorneys have notified the defendants that they are asserting "liens" for their contingent fees against the $40 million fund, and, to the extent payments from that the fund might not satisfy their claims, against the defendants personally. In addition, they have indicated an intention to file tort claims against the defendants in other courts, asserting fraud and interference with contractual relations and seeking compensatory and punitive damages. The theoretical basis for the attorneys' position is essentially three-fold.

First, the attorneys assert that this court's Order of May 8, 1997 approving the class settlement is "void" by

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[2] Attorneys Mull and Kozak take a common position on the issues addressed in this opinion and will therefore sometimes be referred to as Mull-Kozak. Attorneys Spece and Ibanez also present a common argument, similar but not necessarily identical to that of Mull-Kozak, and they will sometimes be referred to as Spece-Ibanez. The four attorneys will also sometimes be referred to collectively simply as "the attorneys."

[3] Although this is a Rule 23 class and no "opt-in" is actually involved, there have been various problems in regard to opt-outs, so that the court and the parties have adopted the convention of referring to "opt-ins" and "opt-outs."

reason of the Supreme Court's decision in *Amchem Prods., Inc. v. Windsor*, 117 S.Ct. 2231 (1997).

The second basis for the attorneys' position is that, not being parties to the case or the settlement agreement, they are not "bound" by the May 8 Order and are free to assert their contractual rights.

Finally, the attorneys argue that whatever the status of the May 8 Order and the class settlement, the releases submitted by the defendants to the class members depart so materially from the terms of the settlement that they constitute "new offers" to each of the 6,000 opt-ins, which render enforceable the contingent fee contracts of the attorneys.

All of the attorneys argue that the defendants had a fraudulent intent in entering into the settlement in that their true purpose was to interfere with the attorneys' contingent fee contracts.

Three motions are before the court for decision. Mull-Kozak have filed a "Motion to Enforce Settlement," which seeks to compel the defendants to disburse the $100,000 settlement payments to each of their opt-in clients without further delay and without regard to the fact that Mull-Kozak are claiming the right to fees and damages in excess of any amounts they may be found entitled to receive from the fee fund established pursuant to the settlement. Spece-Ibanez have filed a motion seeking similar relief and, in addition, an order invalidating the portion of the release which releases the federal government. They also ask leave to conduct discovery in regard to the alleged fraud on the part of the defendants. For their part, the defendants have filed a "Motion for

Enforcement of Order" and a "Motion to Adjudicate Liens."

DISCUSSION

I. WHETHER THE MAY 8, 1997 ORDER APPROVING THE CLASS SETTLEMENT IS "VOID"

Assuming *arguendo* that the decision of the Supreme Court in the *Amchem* case would have precluded the class settlement in this case, the fact is that the order approving the settlement was entered on May 8, 1997, and *Amchem* was not decided until June 25, 1997, six weeks later. The attorneys have offered no persuasive argument for giving *Amchem* retrospective application, but argue instead that the holding of *Amchem* means that this court lacked subject matter jurisdiction to approve the settlement. But, as defendants point out, the attorneys are confusing subject matter jurisdiction with the different question of whether the settlement class met the requirements of Rule 23. Any question on the latter point does not go to the court's subject matter jurisdiction but simply to the question of whether, under the law as it existed prior to the *Amchem* decision, the requirements of Rule 23 were met. That was something that could have been taken up on appeal but was not because these attorneys elected not to do so. Because the May 8, 1997 Order was not an appeal by a party to the case at the time of the Supreme Court's decision in *Amchem*, that decision does not affect the order. *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993).

Moreover, before this court decided to approve the settlement, it concluded that the situation addressed by

the Third Circuit in *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3rd Cir. 1996), the case that became *Amchem* in the Supreme Court, was factually distinguishable in critical ways from this case. We are of that same view today. The considerations which prompted the Supreme Court to set aside the settlement in *Amchem* – primarily the lack of any genuine adversarial process and the lack of any guarantee of fair representation of absent class members – are simply not present here. In the event this settlement had been reviewed on appeal, there is substantial basis for believing it would have been approved. Certainly there is no basis for giving Mull-Kozak and Spece-Ibanez the benefit of a presumption that it would have been set aside.

As far as this court is concerned, the May 8, 1997 Order remains in full force and effect and is not subject to challenge on the basis of *Amchem* or any other authority.

II. WHETHER THE ATTORNEYS ARE BOUND BY THE MAY 8, 1997 ORDER INSOFAR AS THEIR FEES ARE CONCERNED

While arguing that they are not "bound" by the settlement agreement or the Order of May 8 because they were not "parties" to either, the attorneys have no hesitation about seeking to benefit from the settlement. They have all sought and received substantial cost reimbursements from the cost and fee fund. They also seek to collect their contingent fees from the fund.

While it is technically true that the attorneys are not "parties" to the settlement, it does not follow that they are not bound by its terms. On the contrary, as the court

held in *Skelton v. General Motors Corp.*, 860 F.2d 250, 259-260 (7th Cir. 1988), *cert. denied* 493 U.S. 810 (1989), the conduct of the attorneys "binds them to the agreement." *Id.* at 259. They participated in the settlement, urged the court to approve it and gave no indication that they were intending to challenge the provision concerning attorneys' fees. They have accepted benefits under the settlement. Under the analysis of *Skelton*, which also involved a dispute over attorneys' fees in a class settlement with fee and cost fund, this conduct on the part of the attorneys has bound them to the terms of the agreement, including the terms they dislike.

It requires little reflection to understand the need for such a rule if class action settlements are to be enforceable at all. It is doubtful that the court has authority to require the individual attorneys for all class members to sign the settlement agreement, since it is true that the attorneys are not parties. Moreover, the distrust implied in such a demand would be demeaning to both the court and the bar. But even though the attorneys have not signed the agreement, it is surely reasonable for the court to regard them as bound by any provisions that may affect them, such as limitations on their fees, in the absence of any objection by them, unless, of course, there has for some reason been an insufficient opportunity to object. Here, there was no lack of opportunity – there was every opportunity, and for a long period of time. The approval of this settlement was the result of a protracted process of which Mull-Kozak and Spece-Ibanez were very much a part. And it is not simply that they failed to object. As they admitted at the hearing the court held on the pending motions, they *knew from the beginning*, even

while they were urging the court to approve the settlement, that they would challenge the limitation on attorneys' fees after the settlement was approved and implementation was underway. They have intended all along to contend that the "settlement only" class was invalid and that therefore the limitation on their fees was unenforceable.

In these circumstances, there is another and more venerable basis for holding the attorneys to the settlement agreement. Their conduct is a classic example of behavior which invokes the doctrine of equitable estoppel. By their affirmative acts and their silence when there was clearly a duty to speak, they intentionally misled *everyone* in the case – the defendants, class counsel, the court and their own clients – into believing that they approved of the settlement, including the limitation on attorneys' fees. Reliance was placed on that misrepresentation, in that the court had no occasion to address any arguments that might legitimately have been made – if there were any – to the propriety of the limitation on attorneys' fees, or any other aspect of the settlement, and the settlement was approved. In further reliance on the apparently solid support for the settlement, the defendants, class counsel, attorneys for individual class members all over the country, and the court itself began the expensive process of implementing the settlement.

The court concludes that the attorneys are bound to the settlement and are estopped to disclaim it.

III. WHETHER THERE ARE 6,000 NEW OFFERS THAT HAVE REPLACED THE CLASS SETTLEMENT

The attorneys contend that various provisions of the releases tendered to class members by the defendants are either contrary to the terms of the settlement or unauthorized by its terms. This is the first step of the argument, and we will deal with it before going to the next step.

The major objection to the releases is the inclusion of the federal and state governments as releasees. The attorneys denounce this as a gratuitous imposition on the class members, unauthorized by the settlement agreement. We disagree. The settlement agreement contemplated that the parties would use their best efforts to obtain waivers of subrogation liens. Release of the federal government from claims by class members was necessary in order to obtain the government's waiver. Also, the settlement agreement provided that efforts would be made to free the defendants from third party claims for indemnification, and, if class members were free to sue the federal government, the government would in turn be free to claim over against the defendants. Therefore, the release provisions were altogether consistent with the intent of the settlement agreement and cannot be regarded as a departure from its terms.

Significantly, it appears that there have been no more than two claims by class members against the federal government, and neither is a client of these attorneys. Any prejudice to the class members from the requirement that the federal government be released, in return for

waiving its reimbursement claims, is nonexistent. No class members have objected to the requirement. The only objectors are Mull-Kozak and Spece-Ibanez, who seek to parlay the release requirement into a benefit for themselves. They completely ignore the fact that what they seek would be a substantial detriment to their clients. If this court were to hold that the class members could not be required to release the federal and state governments from liability, then the federal government and presumably many of the states as well would refuse to waive their claims for reimbursement. As indicated earlier in this opinion, those claims would severely impact the amount of money available to many class members from their $100,000 settlements.[4]

The attorneys also claim that the tendered releases depart from the settlement in that they call for unnecessary and inappropriate signatures. For the reasons expressed earlier in this opinion, *supra* at 4-6, the court disagrees.

Another alleged departure is that the releases waive claims for infections from viruses in addition to HIV, whereas the settlement concerned only HIV. The short answer to this is that the attorneys' argument is simply wrong. The settlement agreement does cover other viruses as well as HIV.

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[4] Another consideration for the release is that the federal government has agreed that receipt of the $100,000 payments will not be deemed to disqualify class members from entitlement to various income-related federal benefits.

The attorneys' final contention concerns Paragraph 14 of the release, which provides that the class member "would agree to the terms of this Release even if the Agreement were not part of a class settlement but rather a completely private settlement." The attorneys argue that this indicates an intent on the part of the defendants to abandon the settlement and enter into individual settlements with the releasors. But the court is satisfied by the defendants' response to this argument: Paragraph 14 was included in the release simply as a hedge against the possibility that some class member might later attempt to set aside the class settlement (just as the attorneys are attempting to do here). The court does not regard this release provision as inappropriate and certainly does not regard it as a recognition by the defendants that the settlement approved in the court's Order of May 8, 1997 is no longer the basis of the parties' obligations.

Even assuming that one or more of these release provisions were inconsistent with the settlement agreement, that would not mean that the settlement was voided or that the parties were free to ignore the Order of May 8. Any violation of the May 8 Order, an order which required the parties to carry out the settlement according to its terms, should have been brought to the attention of the court for appropriate action. It should not have been seized upon by these attorneys as a basis for arguing that the settlement is a nullity.

The next step of the attorneys' argument is moot because they have failed the first step, but we will address it anyway. It is this: because the releases depart from the settlement, they constitute offers to make new contracts with each of the 6,000 class members. Then, if

the class member signs the release, this constitutes an acceptance of the new offer.[5] Because the class settlement has been abandoned, the fee limitation does not apply in the new situation and the attorneys are now free to assert lien rights to their one-third contingent fees. The argument becomes murky at this point as to what the liens apply to. The attorneys have stated repeatedly that they do not claim a share of their clients' $100,000 settlements.[6] Yet, their contingent fee contracts are with those clients, not with the defendants. The only contract the defendants made to pay attorneys' fees was their commitment in the settlement agreement to deposit a $40 million fund from which the court would determine what fees are to be paid. In return for that deposit they were relieved of any other obligation in regard to attorneys' fees. What Mull-Kozak and Spece-Ibanez seek to do is to collect their one-third contingent fees from the fee fund established pursuant to the settlement. They contend that

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[5] This part of the argument is not altogether clear. If any of the Mull-Kozak and Spece-Ibanez clients have not yet executed and returned the releases, there would be no "new contract" in existence as to those clients. Indeed, Spece-Ibanez have asked the court to set aside some of the provisions they claim make the releases an offer of a new contract. It is not clear to the court whether the "new contract" argument applies only when the "offer" has been "accepted" by a return of the executed release in its present form, or whether the argument is intended to apply with full force – such as that may be – to the situation where all that has occurred is that the class member has received the proposed release but has not executed and returned it.

[6] On the other hand, Messrs. Mull and Kozak requested the defendants to include their names as payees on the settlement checks to their clients.

their liens attach to the fund, but we fail to see the logic of that argument. Even if the attorneys were correct in their position that the class settlement does not exist, the $40 million fund was nonetheless established pursuant to that settlement. Nothing about a failure of the settlement or the substitution of 6,000 new contracts would make the fund subject to any attorneys' liens. If the settlement fails, the fund would simply revert to the defendants.

Alternatively, the attorneys argue that they can enforce their liens against the defendants personally. If this were a case where the defendants had been served with valid attorneys' liens asserting fee claims against clients and had paid all of the settlement money to the clients without withholding the amount of the liens, the attorneys would have an action to recover the amount of their fees from the defendants personally. There would be no other way of enforcing the liens. However, that is not this case. Here, any claims these attorneys had against their clients for contingent fees were extinguished by the class settlement which the attorneys endorsed. A lien is only as good as the underlying claim for fees, and in this case there is no fee claim that remains against the clients.

The attorneys' argument that they have plausible claims for fraud or interference with contractual relations is also without basis.[7] Their threats to file such actions are

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[7] Ironically, it could be that the class settlement provides the attorneys their best hope of recovering *any* fees on the cases which have opted into the settlement. As we had occasion to note in the May 8 Order, $100,000 is modest compensation for the injuries these claimants have suffered. A verdict of many times that amount could reasonably be expected in any case

an effort to interfere with the class settlement to which they are bound, and any such actions must be restrained.[8]

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where the plaintiff prevailed on liability. The problem, as everyone connected with the case understands, is that many of the claimants face difficult hurdles in regard to liability (e.g., product identification and limitations), so that, for many class members, the practical choice was between accepting the $100,000 or receiving nothing at all. The court is aware that a variety of reasons may have motivated class members to accept the settlement, but it is probably true that most claimants who believe they have a reasonably good prospect of recovery have opted out. If this is a valid observation, then many of the clients of Mull-Kozak and Spece-Ibanez who have opted into the settlement, especially if they have done so based on the advice of their attorneys, are clients who do not have good prospects of recovering in individual lawsuits. The likelihood that Mull-Kozak or Spece-Ibanez would have collected any contingent fees in those cases is questionable. The class settlement, and the fee fund, may offer the attorneys the best chance of compensation for any work they have done on these cases, but they were not satisfied with that opportunity. Instead, they seek to have it both ways, clinging to the settlement fee fund but at the same time trying to collect percentage fees, as well. And "percentage" rather than "contingent" is the right term, for they are no longer merely hoping for a share of an uncertain recovery. Rather, they are putting in for a percentage of an established fund, with nothing contingent about it. After that bonanza, they would then turn to collection of compensatory and punitive damages from the defendants for "interference" with their contingent fee contracts.

[8] The authority for the injunctive portions of this order is the court's inherent power to enforce its own orders, the court's power and responsibility under Rule 23 of the Federal Rules of Civil Procedures to see to it that the class settlement is carried out according to its terms, and the All Writs Act, 28 U.S.C. § 1651(a), which provides that the court "may issue all writs necessary or appropriate in aid of [its . . . jurisdiction] and agreeable to the usages and principles of law."

The defendants are required by the Order of May 8 to proceed with the settlement and they are entitled to proceed with the assurance of the court that they will not be subjected to collateral litigation as a result of their compliance.

CONCLUSION

For the foregoing reasons,

The motion of Mull-Kozak to enforce the settlement is denied;

The motion of Spece-Ibanez for an order rescinding release provisions exonerating government bodies and for other relief, including discovery on the issue of fraud, is denied;

The motion of defendants for adjudication of liens is granted; and

The motion of defendants for enforcement of the order of May 8, 1997 is granted.

More specifically, it is hereby ordered that:

(A) Any purported attorneys liens asserted by attorneys Thomas W. Mull, Charles R. Kozak, Roy G. Spece, Jr. and Rose Ibanez against the fee and cost fund established in this case, or against any of the defendants personally, are hereby held to be null, void and of no effect. Said attorneys are hereby permanently enjoined from asserting or attempting to assert any such lien in any court or in any other manner.

(B) Said attorneys are hereby permanently enjoined from filing any suit in any court for purposes of challenging the fee limitation contained in the class settlement in this case or seeking to collect any fee for representing any opt-in claimant in this case, or seeking to recover damages from any of the defendants for interference with their alleged right to collect any fee for work on behalf of any opt-in claimant.

(C) The contingent fee contracts between the said attorneys and their clients who have opted into the class settlement are hereby declared to have been superseded by the settlement agreement and final Order of May 8, 1997 and are held to be of no force and effect. The compensation of these attorneys for work done on behalf of opt-in clients shall be limited to the fees awarded to them by this court from the fee and cost fund established pursuant to the class settlement in this case.

Date: February 18, 1998

ENTER:

/s/ John F. Grady
John F. Grady,
United States
District Judge

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

November 4, 1998

Before

Hon. Richard A. Posner, Chief Judge

Hon. William J. Bauer, Circuit Judge

Hon. Ilana Diamond Rovner, Circuit Judge

IN RE FACTOR VIII OR IX CONCENTRATE BLOOD PRODUCTS LITIGATION, Nos. 98-1438 and 98-1770 APPEALS OF ROY G. SPECE, JR., ROSE MARIE IBANEZ, and MULL & MULL.	APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION. No. 96 C 5024 JOHN F. GRADY, *JUDGE*.

IN RE MULL & MULL. No. 98-1629	**Petition for a Writ of Mandamus. No. 94 C 5324 John F. Grady, *Judge*.**

ORDER

On November 2, 1998, appellants (Roy G. Spece, Jr. and Rose Marie Ibanez) filed a petition for rehearing. All the judges on the original panel have voted to deny the petition. The petition for rehearing is therefore DENIED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

FACTOR CONCENTRATE LITIGATION SETTLEMENT AGREEMENT

* * *

August 13, 1996

[p. 37] L. COST AND FEE FUND

1. Within 5 business days after signing this Agreement, each fractionator shall deposit into an interest bearing escrow account in a major U.S. commercial bank, designated by Lead Class Counsel and agreed to by the Fractionators (which agreement shall not be unreasonably withheld), its proportionate share of a $40 million Cost and Fee Fund, *i.e.*, Alpha $6,000,000, Armour $8,000,000, Bexter $8,000,000 and Bayer $18,000,000. Interest earned on the Cost and Fee Fund shall become part of the Cost and Fee Fund. In the event one or more of the Fractionators subsequently withdraws from this Agreement, but the Settlement goes forward as to at least one Fractionator, the proportionate share(s) of principal and interest in the Cost and Fee Fund shall be promptly refunded to the withdrawing Fractionator(s), after deduction of its/their proportionate share of the cost of Notice to Class members and any administrative costs incurred to the date of withdrawal. After all Court-ordered or Court-approved payments from the Cost and Fee Fund have been made, the principal or interest remaining in the Cost and Fee Fund, if any, shall be refunded to the participating Fractionator(s) in its/their proportionate share.

2. The Cost and Fee Fund shall be used to pay attorneys' fees and costs, as provided in paragraph L(4), as well as the costs of Notice provided for in Section D of this Agreement, the costs and fees of the Guardian *Ad Litem* provided for in Section I, the costs and fees of the Settlement Administrator or Special Master [p. 38] or other judicial officer, and the costs of processing the Claim Forms, including costs associated with the Dispute Resolution Process described in Section K. Approval of payments from the Cost and Fee Fund for Notice, for the Guardian *Ad Litem*, for processing Claims Forms and for the Dispute Resolution Process shall be the responsibility of Lead Class Counsel, subject to Court approval. The Parties shall request that the Court enter an Order providing that no attorneys' fees shall be payable by any class member other than those fees approved by the Court to be payable from the Cost and Fee Fund except as provided in paragraph L(4).

3. Such attorneys' fees and reimbursement of cost disbursements as the Court may award to Class Counsel, to members of the MDL-986 Plaintiffs' Steering Committee, and to any other attorney who represents one or more members of the Settlement Class shall be paid from the Cost and Fee Fund, except as provided in paragraph L(94).

4. Because it is the function of Class Counsel to provide information to Class members about this Settlement, any Claimant or Claimant Group who seeks the advice of an attorney other than Class Counsel on the question whether to participate in this Settlement shall be personally responsible for paying that attorney's reasonable charges, if any, for such advice. Any such charges

shall be on the basis of reasonable hourly rates for actual time expended on behalf of that client, and shall be subject to review by the Court. No attorney shall be entitled to any payment from [p. 39] the Cost and Fee Fund for advice that he or she has given a client on the question whether to participate in the Settlement.

5. In establishing the Cost and Fee Fund, the Fractionators are not conceding that aggregate fees and costs of $40,000,000 (or any other amount) should be awarded, and the Fractionators retain the right to object to applications for fees and reimbursement of costs. Under no circumstances, however, shall the Fractionators have any obligation whatsoever to pay any costs and fees other than their obligation to deposit $40,000,000 to establish the Cost and Fee Fund.

6. Class counsel, members of MDL-986 Plaintiffs' Steering Committee, and individual attorneys representing Settlement Class members shall petition the Court for awards of attorneys' fees and costs from the Cost and Fee Fund, which petitions shall be filed on a date to be established by the Court.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: FACTOR VIII OR IX CONCENTRATE BLOOD PRODUCTS LITIGATION	MDL-986 93-C-7452 THIS DOCUMENT RELATES TO:
SUSAN WALKER, Administratrix of the Estate of STEVEN WALKER, Deceased, Plaintiff, vs. BAYER CORPORATION, et al., Defendants.	NO. 96-C-5024

PRETRIAL ORDER NO. 32

(Certification of Settlement Class,
Preliminary Approval of Settlement Agreement,
Authorization to Disseminate Notice, and
Dates for Memoranda and Applications)

Upon consideration of the Motion for certification of Settlement Class, for Preliminary Approval of the Factor Concentrate Litigation Settlement Agreement dated August 13, 1996 ("Settlement Agreement"), and for

Authorization to Disseminate Notice to the Settlement Class, and the Memorandum in Support thereof, and after consideration of the entire record in these consolidated proceedings, it is hereby ORDERED as follows:

1. The Settlement Class is defined as all living persons who, as of August 13, 1996, are, and all deceased persons who at the time of their deaths were, citizens or permanent residents of the United States, including all of its possessions and territories, and persons who are not, and deceased persons who were not, citizens or permanent residents of the United States but who are, or whose personal representatives are plaintiffs in lawsuits against one or more of the Fractionators that, as of January 1, 1996, were pending in any Court of the United States, and who are or were:

> (a) persons with hemophilia who used Factor Concentrates, processed or distributed by any of the Fractionators during the period from 1978 through 1985, and who are or were HIV infected (including those HIV infected persons who are or were also infected with hepatitis or any other infectious agents allegedly transmitted by such Factor Concentrates),
>
> (b) all persons who, as a result of their relationship as spouses or as monogamous and cohabitating partners of at least two consecutive years duration of persons in paragraph (a), are or were also HIV infected (including those HIV infected persons who are or were also infected with hepatitis or any other infectious agents allegedly transmitted by such Factor Concentrates),

(c) all children of persons in sections (a) or (b) who as a result of their relationship with persons in sections (a) or (b) are or were HIV infected (including those HIV infected children who are or were also infected with hepatitis or any other infectious agent allegedly transmitted by such Factor Concentrates),

(d) all persons who are not or were not HIV infected but who nevertheless have or allegedly have derivative claims resulting from a family relationship (such as uninfected spouses, parents or children) with a person in sections (a), (b), or (c), based upon the use of such Factor Concentrates by a person with hemophilia, including, but not limited to, such claims as loss of consortium, love and support, fear of AIDS, hepatitis or any other infectious agents, emotional distress, or claims for wrongful death under an applicable wrongful death statute,

(e) parents or guardians, on behalf of any minor or otherwise legally incompetent class members in sections (a) (b), (c) or (d), and

(f) the estates and all persons who are now, or are eligible to become, executors, executrixes, administrators, administratrices or personal representatives of any deceased class members in sections (a), (b), (c), (d) or (e).

Expressly not a part of the Settlement Class are the following:

(a) any person who has previously made a claim, or who is a member of a Claimant Group which includes another person who has previously made a claim, against one or more of the Fractionators (including claims against one or

more of the Fractionators and one or more non-Fractionators), as a result of which a payment or payments totaling $100,000 or more have already been made by one or more of the Fractionators, unless such person has his or her own Direct Claim that has not previously been settled for $100,000 or more;

(b) any person who has previously settled in any amount with all four of the Fractionators, or who is a member of Claimant Group which includes another person who has previously settled in any amount with all four of the Fractionators, unless such person has his or her own Direct Claim that has not previously been settled with all four of the Fractionators;

(c) any person who, since April 19, 1996, has settled in any amount with one or more of the Fractionators or who is a member of a Claimant Group which includes another person who since April 19, 1996, has settled in any amount with one or more of the Fractionators;

(d) any person who is or was a plaintiff in a lawsuit, or who is a member of a Claimant Group which includes another person who is or was a plaintiff in a lawsuit, against one or more of the Fractionators that has gone to judgment in a trial Court, unless such person has his or her own Direct Claim that has not gone to judgment, *provided, however,* that a person against whom judgment has been entered for lack of prosecution of a claim shall not be excluded from the Settlement Class;

(e) any person who submits a timely written request to be excluded from the Settlement Class; and

(f) any person who is a plaintiff in a case in which trial begins between the date of conditional certification and the date of final certification of the Settlement Class, or whose claim relates to or derives from the plaintiff in such a case.

2. David S. Shrager and Dianne M. Nast are hereby appointed Lead Class Counsel for the Settlement Class, and are authorized to carry out the duties of class counsel in association with members of the Court-appointed Steering Committee who shall serve as Class Counsel.

3. The Settlement Agreement (Exhibit A) is preliminarily approved and is sufficiently fair, reasonable and adequate to permit Notice to be disseminated to members of the Settlement Class.

4. The Notice ("Important Legal Notice") and the Summary-Notice which have been submitted to the Court, (Exhibits B and C), comply with F.R.Civ.P. 23 and are hereby approved. The Notice and Summary Notice in substantially the forms set out in Exhibits B and C shall be disseminated to members of the Settlement Class. The parties are directed promptly to submit to the Court for approval the Confidential Claim Form and Exclusion Form that the parties are now preparing in accordance with a letter agreement that has been made part of the record in this case.

5. The Notice Plan (Exhibit D) submitted by Plaintiff is approved, and all parties are directed to implement and carry out that plan within the timetable set forth therein.

6. On or before *August 16, 1996,* each Defendant, other than the National Hemophilia Foundation, shall provide

to Lead Class Counsel the names and addresses of all potential Settlement Class members, to the extent such names and addresses are known to any Defendant or can be identified through reasonable effort. Lead Class Counsel shall maintain all such names and addresses under strict confidentiality, limited to those persons necessary to implement this Order.

7. On or before *August 16, 1996,* all Defendants shall provide to Lead Class Counsel the names and addresses of each attorney or other person, reasonably known to them, who purports to represent a Settlement Class member.

8. On or about *August 20, 1996,* Lead Class Counsel shall mail the Notice and the Confidential Claim Form and Exclusion Form, by first class mail, to all Settlement Class members who can be identified through reasonable effort, and to attorneys and others identified pursuant to Paragraphs 6 and 7 herein.

9. On or about *August 20, 1996,* Defendant The National Hemophilia Foundation, shall mail the Notice, and the Confidential Claim Form and Exclusion Form, by first class mail (multiple copies of postage prepaid Notices to be provided by Lead Class Counsel) to each individual and organization on its mailing list.

10. On or about *August 20, 1996,* Lead Class Counsel will provide multiple copies of first class, postage prepaid Notices, and Confidential Claim Forms and Exclusion Forms, to each United States local Chapter of the National Hemophilia Foundation identified by it pursuant to paragraph 9 herein. Lead Class Counsel and the

National Hemophilia Foundation will request each such local Chapter to mail these documents to its members.

11. On or about *August 20, 1996,* Lead Class Counsel will provide multiple copies of first class postage prepaid Notices, Confidential Claim Forms and Exclusion Forms, to hemophilia membership groups which can be reasonably identified, including membership groups such as the Committee of Ten Thousand, The Hemophilia Foundation, The Hemophilia Association of Southern California, The Hemophilia Association of New Jersey, The Hemophilia/HIV Peer Association, all United States based centers and facilities and organizations listed in the current NHF Directory of Centers and Facilities, and the American Red Cross. Lead Class Counsel will request each such organization to mail these documents to all persons in the hemophilia community for whom addresses are available.

12. No organization, including The National Hemophilia Foundation, its local chapters, or other organization or association shall incur legal liability to Settlement Class members related to the mailing of notice.

13. On or about *August 30, September 3,* and *September 6,* 1996, Lead Class Counsel will cause the Summary Notice to be published in all national editions of *USA Today.*

14. On or about *August 30, 1996,* Lead Class Counsel will provide informational releases to radio, television and print media in the United States by utilizing the PR Newswire or similar services.

15. On or about *August 30, 1996,* Lead Class Counsel shall cause the Summary Notice to be posted, to the extent possible, on various computer networks that are

part of the Internet, including any appropriate bulletin board or other location which can reasonably be identified. Posting on such computer networks shall be done on a weekly basis, to the extent the computer networks will allow weekly posting, through and including the week of *September 16, 1996.*

16. The costs of the Notice shall be paid from the separate Cost and Fee fund provided for in Section L of the Settlement Agreement.

17. All Memoranda in Support of Final Approval of the Settlement shall be filed on or before *September 16, 1996.*

18. The confidential Claim Forms, requests for exclusion from the Settlement Class, any objections to the proposed settlement or to any application for attorneys fees and cost disbursements, must be postmarked on or before *October 15, 1996.*

19. A hearing to consider final approval of the Settlement Agreement shall be held on *November 25, 1996* at 9:30 a.m., Chicago local time, in Courtroom 2525, United States District Court, Northern District of Illinois, Eastern Division, 219 South Dearborn Street, Chicago, Illinois 60604. This hearing may be adjourned without further notice.

20. The Court, in its capacity as fiduciary for all settlement class members, possesses and intends to exercise its authority, to approve and supervise all payments of attorneys' fees and reimbursement of cost disbursements for all counsel representing members of the Settlement Class, including the members of Plaintiffs' Steering Committee

and all individual counsel for any Settlement Class member. The Court intends to authorize such payments and reimbursements through the mechanism of the Cost and Fee Fund provided for in the Settlement Agreement, to which all applications for payment and reimbursement of expenses shall be made. All applications for fees and reimbursement of expenses by any attorney representing or purporting to represent any member of the Settlement Class, shall be filed with the Clerk of the Court by *September 23, 1996.* The Court retains its authority to modify contingent fee contracts entered into with Settlement Class members as necessary, to scrutinize carefully services performed an behalf of Settlement Class members, to ensure that compensation is reasonably related to services performed to members of the Settlement Class.

21. Lead Class Counsel and Defendants' Counsel are directed to cooperate in serving copies of this order upon every counsel in every pending federal and state lawsuit of which they are aware in which it appears that plaintiff is or may be a member of the Settlement Class as defined in Paragraph 1 of this Order.

Dated: 8-14, 1996

ENTER: /s/
John F. Grady,
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	:	MDL-986 93-C-7452
FACTOR VIII OR IX CONCENTRATE BLOOD PRODUCTS LITIGATION	:	THIS DOCUMENT RELATES TO:
	:	NO. 96-C-5024

IMPORTANT LEGAL NOTICE

TO: **ALL PERSONS WITH HEMOPHILIA WHO USED BLOOD CLOTTING FACTOR CONCENTRATES PROCESSED OR DISTRIBUTED FROM 1978 THROUGH 1985, AND WHO ARE (OR WERE) INFECTED WITH HIV AND THEIR ESTATES.**

PLEASE READ THIS ENTIRE NOTICE CAREFULLY
YOUR LEGAL RIGHTS MAY BE AFFECTED

YOU MAY BE ENTITLED TO RECEIVE $100,000

NOTICE CONCERNING SETTLEMENT

A proposed settlement in a class action lawsuit involving blood clotting factor concentrates is now pending in federal court in Chicago, Illinois and may affect your rights. Please read this Notice carefully.

If you or your family member is a person with hemophilia who used Factor VIII or Factor IX (Factor Concentrates) processed or distributed by any of the Defendants during 1978 through 1985 and are (or were) infected with HIV, you may be eligible to receive $100,000 as a result of

the proposed settlement. This settlement may be available to you if you or your family member have a lawsuit pending in federal or state court, or *even if you have not filed a lawsuit.* This Notice describes your rights.

DESCRIPTION OF THE LITIGATION

The Honorable John F. Grady, a Judge of the United States District Court for the Northern District of Illinois, has pending before him numerous cases filed by persons with hemophilia, their HIV infected spouses and children, and their estates. These lawsuits claim injury from the use of HIV-contaminated plasma-derived factor concentrates, specifically Factors VIII and IX.

The principal defendants in these suits are: ALPHA THERAPEUTIC CORPORATION, GREEN CROSS OF AMERICA CORPORATION and THE GREEN CROSS CORPORATION (collectively, "Alpha"), ARMOUR PHARMACEUTICAL COMPANY, RHONE-POULENC RORER INC. (collectively, "Armour"), BAXTER HEALTHCARE CORPORATION and BAXTER INTERNATIONAL INC. (collectively, "Baxter"; which also refers to Travenol Laboratories, Inc., and Hyland Therapeutics, a division of Baxter Healthcare Corporation), and BAYER CORPORATION and BAYER A.G. (collectively, "Bayer"; which also refers to Cutter Laboratories, Inc., Cutter Laboratories, a division of Miles, Inc., Miles Laboratories, Inc., Miles, Inc. and Miles Inc.). These Defendants are referred to in this Notice as the "Fractionators."

These lawsuits allege that the Fractionators are legally responsible for HIV infections caused by factor

concentrates. The Fractionators have vigorously defended these lawsuits and deny any liability.

The Judicial Panel on Multidistrict Litigation consolidated all federal cases before Judge Grady in 1993. Thereafter, Judge Grady appointed a Plaintiffs' Steering Committee to conduct that litigation, including discovery of common issues, on behalf of all of those plaintiffs. Judge Grady has also attempted carefully to coordinate this consolidated federal litigation with the pretrial preparation of similar cases pending in various state courts.

On November 3,1994, the District Court certified a litigation class action to resolve certain issues which it believed were common to all cases. However, on March 16, 1995, in response to a petition filed by the Fractionators, the United States Court of Appeals for the Seventh Circuit held that these issues were not properly certified as a litigation class action and directed that the class be decertified. On January 16, 1996, the District Court issued an Order decertifying the litigation class.

There has been substantial litigation before Judge Grady concerning the merits of the lawsuits which have been filed against the Fractionators including: examining, analyzing, and classifying over a million pages of the Fractionators' documents; briefing and arguing dozens of discovery and other pretrial motions; obtaining, analyzing and conducting hundreds of depositions, including depositions of the Fractionators' employees, and former employees; conducting extensive investigation, including medical and scientific research, into those common issues in this litigation impacting on any legal responsibility of

the Fractionators; and retaining and presenting for deposition testimony medical and scientific experts.

On April 19, 1996, the Fractionators, without admitting liability, and to limit the time, expense and risks of continued litigation, proposed a nationwide settlement of all claims of all members of the Settlement Class (which is described below). In August, 1996, following extensive negotiations among the Parties, a comprehensive settlement agreement was reached.

Judge Grady has certified a Settlement Class for purposes of considering whether to approve that settlement, which is described in this Notice. If you are a member of the Settlement Class defined below, your rights are affected by this Proposed Settlement. You are eligible to file a claim to participate in this Settlement even if the Fractionators have defenses to your claim, such as the statute of limitations, that might otherwise defeat your claim if you have filed or later file your own separate lawsuit. If you meet the definition of a Settlement Class member as described in the next section of this Notice ("Description of the Settlement Class"), no defenses that a Fractionator may have will play any role in determining whether or not you are eligible for this Settlement.

DESCRIPTION OF THE SETTLEMENT CLASS

The Settlement Class consists of all living persons who, as of August 13, 1996, are, and all deceased persons who at the time of their deaths were, citizens or permanent residents of the United States, including all of its possessions and territories, and persons who are not, and deceased persons who were not, citizens or permanent

residents of the United States but who are, or whose personal representatives are plaintiffs in lawsuits against one or more of the Fractionators that, as of January 1, 1996, were pending in any Court of the United States, and who are or were:

(a) persons with hemophilia who used Factor Concentrates, processed or distributed by any of the Fractionators during the period from 1978 through 1985, and who are or were HIV infected (including those HIV infected persons who are or were also infected with hepatitis or any other infectious agents allegedly transmitted by such Factor Concentrates),

(b) all persons who, as a result of their relationship as spouses or as monogamous and cohabitating partners of at least two consecutive years duration of persons in paragraph (a), are or were also HIV infected (including those HIV infected persons who are or were also infected with hepatitis or any other infectious agents allegedly transmitted by such Factor Concentrates),

(c) all children of persons in sections (a) or (b) who as a result of their relationship with persons in sections (a) or (b) are or were HIV infected (including those HIV infected children who are or were also infected with hepatitis or any other infectious agent allegedly transmitted by such Factor Concentrates),

(d) all persons who are not or were not HIV infected but who nevertheless have or allegedly have derivative claims resulting from a family relationship (such as uninfected spouses, parents or children) with a person in sections (a), (b), or (c), based upon the use of such Factor

Concentrates by a person with hemophilia, including, but not limited to, such claims as loss of consortium, love and support, fear of AIDS, hepatitis or any other infectious agents, emotional distress, or claims for wrongful death under an applicable wrongful death statute,

(e) parents or guardians, on behalf of any minor or otherwise legally incompetent class members in sections (a), (b), (c) or (d), and

(f) the estates and all persons who are now, or are eligible to become, executors, executrixes, administrators, administratrices or personal representatives of any deceased class members in sections (a), (b), (c), (d) or (e).

Expressly not a part of the Settlement Class are the following:

(a) any person who has previously made a claim, or who is a member of a Claimant Group which includes another person who has previously made a claim, against one or more of the Fractionators (including claims against one or more of the Fractionators and one or more non-Fractionators), as a result of which a payment or payments totaling $100,000 or more have already been made by one or more of the Fractionators, unless such person has his or her own Direct Claim that has not previously been settled for $100,000 or more;

(b) any person who has previously settled in any amount with all four of the Fractionators, or who is a member of Claimant Group which includes another person who has previously settled in any amount with all four of the Fractionators, unless such person has his or her own

Direct Claim that has not previously been settled with all four of the Fractionators;

(c) any person who, since April 19, 1996, has settled in any amount with one or more of the Fractionators or who is a member of a Claimant Group which includes another person who since April 19, 1996, has settled in any amount with one or more of the Fractionators;

(d) any person who is or was a plaintiff in a lawsuit, or who is a member of a Claimant Group which includes another person who is or was a plaintiff in a lawsuit, against one or more of the Fractionators that has gone to final judgment in a trial court, unless such person has his or her own Direct Claim that has not gone to judgment, *provided, however,* that a person against whom judgment has been entered for lack of prosecution of a claim shall not be excluded from the Settlement Class; (e) any person who submits a timely written request to be excluded from the Settlement Class; and

(f) any person who is a plaintiff in a case in which trial begins between the date of conditional certification and the date of final certification of the Settlement Class, or whose claim relates to or derives from the plaintiff in such a case.

GENERAL ELIGIBILITY GUIDELINES

The following are merely general guidelines for eligibility and should not be read or understood to contradict the formal class definition outlined above which determines eligibility, To simplify matters, the basic guideline for eligibility is that each HIV infected person is generally

eligible to receive $100,000 from the Settlement if he or she used Factor Concentrates processed or distributed by any of the Fractionators during the period 1978 through 1985. Also potentially eligible are persons who contracted HIV through birth, or sexual relations with a spouse or eligible partner who took Factor Concentrates. However, as stated in the class definition, family members of such persons (those who have what the law calls derivative claims) are not separately eligible to receive $100,000, unless they themselves are infected with the HIV virus.

To illustrate, an HIV infected person with hemophilia who used Factor Concentrates processed by any of the Fractionators at any time during the period 1978 through 1985 is eligible to file a claim and, if approved, to receive $100,000 under the Settlement. If his wife is HIV infected as a result of sexual relations with him, she may also file a claim, and if approved, receive a separate $100,000. If they had a child who was also HIV positive through birth, this child would also be eligible to file a claim and, if approved, receive a separate $100,000. However, if the spouse or child is not HIV positive, they are part of the "Claimant Group" of the infected father or husband, and cannot file a separate claim for $100,000.

A claim may be also filed on behalf of a person who is deceased. In the illustration above, if the father had died, the executor of his estate, or his personal representative, can assert his claim. The same $100,000 payment will be made, just as though the father or husband were alive and had filed his own claim form. The same is true for a deceased spouse, or deceased child, who was HIV positive.

It is not necessary that the deceased person have died of AIDS. Death can be from any cause, so long as the deceased person met the definition of an HIV infected Settlement Class member (paragraphs A, B, or C above).

You are a member of the Settlement Class if you meet the definition on page 2, regardless of whether you already have a lawsuit pending in federal or state court, or have never filed any lawsuit. However, if you have filed a lawsuit against one or more of the Fractionators that has gone to judgment in a trial Court, you are probably not a member of the Settlement Class. In addition, this settlement offer is not available to people who choose to continue their lawsuits after the present Notice. *These individuals must choose either to participate in the present Settlement or to opt out and continue with their present lawsuits.*

The Fractionators have agreed that plaintiffs who previously settled claims with one, two or three (but not all four) of the Fractionators on or before April 19, 1996 for a total amount less than $100,000 are eligible to participate in the present Settlement up to a total of $100,000 (in other words, these individuals can receive the difference, if any, between the total of the previous settlement and $100,000) except that these claimants must be able to show that they used Factor Concentrate processed or distributed in the period 1978 through 1985 by at least one of the Fractionators with which they did not previously settle. For example, a Claimant who previously settled with Bayer and Armour for a total of $45,000 would be entitled to receive another $55,000, assuming

proof of use of Factor Concentrate processed or distributed by either Baxter or Alpha in the period 1978 through 1985.

PROPOSED SETTLEMENT AND PLAN OF DISTRIBUTION OF THE SETTLEMENT FUND

If you want to participate in this Settlement, you must file a Confidential Claim Form. This Form is included in the documents you received with this Notice. It says: "Confidential Claim Form and Exclusion Form" at the top. You must complete and return the form, postmarked on or before **October 15, 1996** to the address indicated. **All information you supply will be kept strictly confidential, by Order of the Court, and will not be published or disseminated in any way.** It will only be used, under strict and confidential supervision, to determine your eligibility to participate in the Settlement.

The Claim Form is designed so that you can complete it yourself. You do not need a lawyer.

Class Counsel have conducted discovery and investigation into the facts of the pending Lawsuits, have studied the general legal principles applicable to the claims in these Lawsuits, as well as the general legal principles applicable to claims that might be made by members of the Settlement Class who are not plaintiffs in the Lawsuits, and have concluded that a class settlement with the Fractionators in the amount and on the terms set forth in this Notice is fair and reasonable, and is in the best overall interest of the Settlement Class. However, it is also recognized that in those instances where individual lawsuits can be successfully litigated and you are willing,

preferably with the advice of an attorney, to assume the risks, the uncertainties, and the delay involved in the outcome of those lawsuits, you might obtain a larger net amount of compensation from an individual lawsuit than the $100,000 that you could receive from the present Settlement. On the other hand, if you pursue your own individual lawsuits, you might recover a lesser net amount or nothing. This is an individual decision which you must make based on your own circumstances.

Under the Settlement terms, the Fractionators will pay $100,000 for each approved claim, in full and final settlement of the class members' claim. The Claimant (and members of that Claimant Group) will thereafter be barred from any further legal action against the Fractionators and all of their present and former corporate parents, subsidiaries, affiliates, partners and joint venturers, as well as suppliers to the Fractionators and distributors for the Fractionators, as well as all directors, officers, employees, agents, insurers, and counsel of the foregoing, as well as their predecessors and successors concerning Factor Concentrate processed or distributed during the period 1978 through 1985.

If you accept this settlement, the $100,000 payment will *not* have any attorneys fees or costs deducted from it. Any attorney who has represented you will have to make application to Judge Grady for any counsel fee and reimbursement of costs, and any such payments will come from a separate fund which Judge Grady may approve, not from the $100,000 paid to you.

Acceptance of the Settlement will end all claims related to the use of Factor Concentrate that you have, or

may have, against the Fractionators. You cannot accept the Settlement, and also file or continue your own lawsuit against Fractionators in either federal or state court. However, acceptance of the Settlement does not affect your right to pursue any claims you have against any person or organization other than the Fractionators (and all of their present and former corporate parents, subsidiaries, affiliates, partners and joint venturers, as well as suppliers to the Fractionators and distributors for the Fractionators, as well as all directors, officers, employees, agents, insurers, and counsel of the foregoing, as well as their predecessors and successors). For example, if you have filed a lawsuit against some party other than the Fractionators, acceptance of this Settlement will not bar you from continuing with that lawsuit, but it could, depending upon the state law applicable to your claim, reduce your total recovery in that lawsuit, especially if the Fractionators were found to be partially responsible for your injuries.

The Fractionators have made the settlement proposal with a desire to achieve substantially complete participation by affected members of the community. Therefore, under the Settlement Agreement, if too many persons decide not to participate, the Fractionators have the right (but are not obligated to) withdraw the Settlement offer. The Confidential Claim Form which has been sent to you includes, at the end, an "Exclusion Form." The "Exclusion Form" must be completed and postmarked on or before **October 15, 1996** if you do *not* desire to participate in the Settlement.

The Settlement is conditioned on resolving issues relating to reimbursement and subrogation claims that

might possibly be asserted – in which part or all of the $100,000 payment could be claimed by various public or private sector healthcare reimbursers or insurers, including Medicare and Medicaid-and issues relating to Class members' continuing eligibility for government programs such as Medicaid or Medicare payments. If these issues are not satisfactorily resolved, this Settlement will not go forward.

The Settlement is also subject to a decision by Judge Grady as to whether or not to approve the settlement as fair and reasonable to members of the Settlement Class. Judge Grady will make this decision after he conducts a final fairness hearing on the Settlement at the Chicago Federal Courthouse at 9:30 a.m. on November 25, 1996. This hearing, and your rights in connection with that hearing, are described below in the section titled "Final Fairness Hearing."

YOUR RIGHTS AND OPTIONS

If you are a member of the Settlement Class, you have the following rights and options.

A. *Your Right to Participate in the Settlement.*

You exercise this right by completing the enclosed Confidential Claim Form. You do not need a lawyer to file the enclosed Claim Form. The completed form, and all information contained in the form, will be treated as Confidential. ***Your Confidential Claim Form must be postmarked on or before October 15, 1996.***

If you choose to participate, and you submit a timely Claim Form and your claim is approved, and if the overall settlement is approved by Judge Grady after the Fairness Hearing (and his Order is upheld and becomes final, in the event an appeal is taken), you will then be eligible to receive a $100,000 payment. Remember, only a single payment can be made to an HIV-infected person. That will end all of your claims against the Fractionators concerning any alleged contamination of Factor Concentrate, and you will not have the right to pursue separate lawsuits against the Fractionators on such claims.

B. *Your Right To "Opt Out" of the Settlement.*

If you are a member of the Settlement Class, you have the right to exclude yourself ("opt out") from the Settlement Class. If you exclude yourself, you cannot participate in the Settlement described in this Notice, and you cannot receive any of the Settlement Funds. You can, however, pursue your own lawsuit with your own attorney.

To exclude yourself from the settlement class, you must complete the "Exclusion Form" which is enclosed. It is part of the "Confidential Claim Form and Exclusion Form" package on p. 5.) Print and sign your name, stating that you want to be excluded from the Settlement, and return the Exclusion postmarked on or before **October 15, 1996.**

The decision whether to exclude yourself from the settlement class is one that should be made with care, and after considering such factors as: (1) the strengths, merits,

and damages potentially recoverable in an individual case, and the risks of losing the lawsuit; (2) your desire to pursue or not pursue individual litigation against the Fractionators, and (3) the value to you of receiving from the Settlement Fund a definite, fixed amount at an earlier time, as opposed to your possible recovery in an individual lawsuit of a different amount in the future (which could be higher, lower or none at all). Each individual may have a greater or lesser chance to succeed in an individual lawsuit, depending upon the specific facts of each case, the applicable state law, including the applicable the statute of limitations, and other defenses available to the Fractionators.

If you decide to opt out of the settlement class to pursue your own individual litigation, you (and your individual attorney, if you have one) *MUST* sign a completed Exclusion Form and return it postmarked on or before October 15, 1996, *even if you already have a lawsuit now pending in federal or state court against these Fractionators over the same subject matter.*

C. ***Your Right to Support or Oppose the Settlement***

If you remain a member of the Settlement Class (in other words, you do not request to be excluded) you also have the right to support or oppose the Settlement at the Court Fairness Hearing. This right is described in more detail in the section of this Notice concerning the Court Fairness Hearing.

D. *Failure to File the Confidential Claim and Exclusion Form:*

If you are a member of the Settlement Class described in this Notice, and you "do nothing" – in other words, do not choose either to participate in the Settlement or exclude yourself ("opt out") from the Settlement Class – you will be barred from any further right to recover from the Fractionators for a claim concerning contamination of Factor Concentrates, even if you already have a lawsuit pending. You will not receive any money from the Settlement Fund, and you will also lose the right to pursue an individual lawsuit against these Fractionators.

FINAL FAIRNESS HEARING

Judge Grady will conduct a Fairness Hearing to determine whether the proposed settlement and plan of distribution is fair and reasonable for members of the Settlement Class. This hearing will be held on November 25, 1996 at the United States District Court, Northern District of Illinois, Eastern Division, Courtroom 2525, 219 South Dearborn Street, 9:30 a.m., Chicago local time. The Hearing may be adjourned without additional notice.

If you exclude yourself from the Settlement Class, this hearing does not concern you and you do not have the right to participate in the Hearing. If you remain a member of the Settlement Class, you have the right, if you choose, to file papers supporting or objecting to the Settlement, and to appear personally or through your attorney at this Hearing to speak in favor of, or in opposition to, the fairness and reasonableness of the proposed

Settlement. If you approve of the Settlement, you do not need to attend the hearing and do not need to send papers stating your approval.

If you remain a member of the Settlement Class, you do not need to be represented by an attorney to support or oppose the Settlement. If you desire to write in favor of or in opposition to the Settlement, you should state each reason you support or oppose the Settlement. Your statement must be postmarked on or before **October 15, 1996.** You must send copies of your statement to each of the following: (1) Clerk of Court of the United States District Court for the Northern District of Illinois, Eastern Division, MDL 986, 219 South Dearborn Street, Chicago, Illinois 60604; (2) David S. Shrager, Two Commerce Square, 2001 Market St., Philadelphia, Pa. 19103; (3) Dianne M. Nast, 36 E. King St., Suite 301, Lancaster, Pa., 17602; and (4) Sara J. Gourley, Sidley & Austin, One First National Plaza, Chicago, Illinois 60603. If you desire to appear and speak at the Fairness Hearing, so indicate in your statement. You do not have to appear at the hearing to write in favor of or to oppose the Settlement.

ATTORNEYS FEES AND COSTS

Attorneys fees and costs will not be deducted from the $100,000 Settlement amount sent to each eligible claimant who participates in the Settlement, except that if you consult an attorney solely to seek advice on the question of whether to participate in the Settlement, you will be personally responsible for paying that attorney's reasonable charges, if any, for such advice. All other payments will be made from the Cost and Fee Fund

established by the Fractionators. The maximum amount of this Fund will be $40 million, plus accrued interest.

If the Settlement is approved by Judge Grady, all requests for attorneys fees and reimbursement of costs – both for members of the Plaintiffs' Steering Committee, and for individual lawyers representing members of the Settlement Class – will require approval by Judge Grady before any such payments of fees will be made.

No fee payments approved by Judge Grady will reduce the settlement payment to Settlement Class members. Applications for costs and fees must be filed of record on September 23, 1996 with the Clerk of Court, United States District Court, Northern District of Illinois, Eastern Division, MDL 986, 219 South Dearborn Street, Chicago, Illinois, 60604, and will be available for your inspection there. If you object to any fee request, you must file your objection with the Clerk of Court at the above address and send a copy to the individuals listed in the "Additional Information" Section below. Any such objections must be postmarked on or before **October 15, 1996**.

The Court will also be requested to authorize payment from the Cost and Fee Fund for claims administration and for the costs of notice and similar costs. None of these costs will affect the Settlement amount to be paid to eligible claimants.

EXAMINATION OF PAPERS AND INQUIRIES

The Settlement Agreement has been filed and is available for inspection by any person during normal

business hours at the office of the Clerk of the United States District Court, Northern District of Illinois, Eastern Division, 219 South Dearborn Street, Chicago, Illinois 60604. The Clerk's Office also has the pleadings, previous orders entered by the Court, and other papers.

Briefs and other papers of the settling parties in support of the Settlement will be filed with the Clerk of Court on or before September 16, 1996. Plaintiffs' Counsel's request for attorney fees and reimbursement of costs and expenses will be filed with the Clerk of Court on or before September 23, 1996. All such documents will be available at the office of the Clerk of Court for your inspection.

ADDITIONAL INFORMATION

ALL QUESTIONS RELATING TO THIS NOTICE MAY BE DIRECTED TO THE FOLLOWING PLAINTIFFS' COUNSEL

David S. Shrager, Esquire
Lead Class Counsel
SHRAGER, MCDAID, LOFTUS,
FLUM & SPIVEY
Two Commerce Square
2001 Market Street
Philadelphia, Pennsylvania 19103
(215) 568-7495 (Fax)

or

Dianne M. Nast, Esquire
Lead Class Counsel
RODA & NAST, P.C.
Suite 301
36 East King Street
Lancaster, Pennsylvania 17602
(717) 397-3669 (Fax)

You may call 1-800-836-9376, if you have questions. If you know of someone who wants to receive this Notice, please send his or her name to one of the attorneys listed above.

PLEASE DO NOT WRITE OR CALL THE COURT OR THE CLERK'S OFFICE FOR INFORMATION

Dated: August 20, 1996 By:

/s/_____
Clerk of the Court
United States District Court
Northern District of Illinois
Eastern Division
219 South Dearborn Street
Chicago, Illinois 60604

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE	)	MDL-986
FACTOR VIII OR IX CONCENTRATE BLOOD PRODUCTS LITIGATION	)	No. 93 C 7452
	)	THIS DOCUMENT RELATES TO ALL CASES
SUSAN WALKER, Administratrix of the Estate of Steven Walker, deceased,	)	
Plaintiffs,	)	No. 96 C 5024
v.	)	
BAYER CORPORATION, et al.,	)	
Defendants.	)	

FINAL ORDER AND JUDGMENT RELATING TO SETTLEMENT

This cause having come before the court for consideration of a final Settlement Agreement and for entry of a Final Order and Judgment, and after full briefing and hearings pursuant to notice where proponents and objectors were heard, and after consideration of the entire record in these consolidated proceedings, it is HEREBY ORDERED as follows:

1. The court has subject matter jurisdiction over this action, and all matters that relate to the settlement.

2. The court has personal jurisdiction over the representative plaintiff, Susan Walker; over the settlement

class members; and over the fractionator defendants (Alpha, Armour, Baxter and Bayer).

3. By order entered on August 14, 1996, this court certified a Settlement class defined as all living persons who, as of August 13, 1996, are, and all deceased persons who at the time of their deaths were, citizens or permanent residents of the United States, including all of its possessions and territories, and persons who are not, and deceased persons who were not, citizens or permanent residents of the United States but who are, or whose personal representatives are plaintiffs in lawsuits against one or more of the Fractionators that, as of January 1, 1996, were pending in any court of the United States, and who are or were:

> (a) persons with hemophilia who used Factor Concentrates, processed or distributed by any of the Fractionators during the period from 1978 through 1985, and who are or were HIV infected (including those HIV infected persons who are or were also infected with hepatitis or any other infectious agents allegedly transmitted by such Factor Concentrates);
>
> (b) all persons who, as a result of their relationship as spouses or as monogamous and cohabitating partners of at least two consecutive years duration of persons in paragraph (a), are or were also HIV infected (including those HIV infected persons who are or were also infected with hepatitis or any other infectious agents allegedly transmitted by such Factor Concentrates);

(c) all children of persons in sections (a) or (b) who as a result of their relationship with persons in sections (a) or (b) are or were HIV infected (including those HIV infected children who are or were also infected with hepatitis or any other infectious agent allegedly transmitted by such Factor Concentrates);

(d) all persons who are not or were not HIV infected but who nevertheless have or allegedly have derivative claims resulting from a family relationship (such as uninfected spouses, parents or children) with a person in sections (a), (b), or (c), based upon the use of such Factor Concentrates by a person with hemophilia, including, but not limited to, such claims as loss of consortium, love and support, fear of AIDS, hepatitis or any other infectious agents, emotional distress, or claims for wrongful death under an applicable wrongful death statute;

(e) parents or guardians, on behalf of any minor or otherwise legally incompetent class members in sections (a), (b), (c) or (d); and

(f) the estates and all persons who are now, or are eligible to become, executors, executrixes, administrators, administratrices or personal representatives of any deceased class members in sections (a), (b), (c), (d) or (e).

Expressly not a part of the Settlement Class are the following:

(a) any person who has previously made a claim, or who is a member of a Claimant Group which includes another person who has previously made a claim, against one or more of the Fractionators (including claims against one or more of the Fractionators and one or more non-

Fractionators), as a result of which a payment or payments totaling $100,000.00 or more have already been made by one or more of the Fractionators, unless such person has his or her own Direct claim that has not previously been settled for $100,000.00 or more;

(b) any person who has previously settled in any amount with all four of the Fractionators, or who is a member of Claimant Group which includes another person who has previously settled in any amount with all four of the Fractionators, unless such person has his or her own Direct Claim that has not previously been settled with all four of the Fractionators;

(c) any person who, since April 19, 1996, has settled in any amount with one or more of the Fractionators or who is a member of a Claimant Group which includes another person who since April 19, 1996, has settled in any amount with one or more of the Fractionators;

(d) any person who is or was a plaintiff in a lawsuit, or who is a member of a Claimant Group which includes another person who is or was a plaintiff in a lawsuit, against one or more of the Fractionators that has gone to judgment in a trial court, unless such person has his or her own Direct Claim that has not gone to judgment, *provided, however,* that a person against whom judgment has been entered for lack of prosecution of a claim shall not be excluded from the Settlement Class;

(e) any person who submits a timely written request to be excluded from the Settlement Class; and

(f) any person who is a plaintiff in a case in which trial begins between the date of conditional, certification and the date of final certification of the Settlement Class, or whose claim relates to or derives from the plaintiff in such a case.

4. By order entered on August 14, 1996, this court preliminarily approved the Factor Concentrate Litigation Settlement Agreement dated August 13, 1996, and authorized dissemination of Notice of the Settlement Agreement to the Settlement Class Members.

5. The court finds that, pursuant to a Plan of Notice approved by this court, notice of the proposed Settlement Agreement was timely mailed to the Settlement Class Members, published as ordered in three (3) issues of *USA Today*, posted on the Internet, and provided to PR Newswire for informational releases to radio, television and print media in the United States.

6. The court finds that the notice given to the Settlement Class Members, which was approved by this court, fully and accurately informed the Settlement Class Members of all relevant and material elements of the proposed Settlement Agreement and afforded them an adequate time to decide whether to opt out of the settlement.

7. The court finds that the notice given to the Settlement Class Members constituted the best notice practicable under the circumstances, that the notice constituted valid, due and sufficient notice to all Settlement Class Members, and that the notice given was in such manner as directed by the court and in full accordance with Rule 23 of the Federal Rules of Civil Procedure.

8. On November 25, 1996, this court held a hearing pursuant to notice to consider final approval of the settlement. The court has considered the objections of persons opposed to the settlement and finds nothing in the objections to justify rejection of the settlement. The objections include:

> (a) the $100,000.00 settlement payment per claimant group is inadequate for the loss suffered;
>
> (b) insurance companies will receive the settlement proceeds or the recipients will be rendered ineligible for government assistance;
>
> (c) infection by Factor Concentrate used in the treatment of a disease called Von Willebrand Disease should qualify for inclusion in the settlement;
>
> (d) each family member should be able to assert his or her own independent claim, rather than being part of a "claimant group" of the infected person;
>
> (e) persons who have litigated and lost prior cases should not be barred from the settlement;
>
> (f) the settlement should be coupled with or made contingent upon passage by Congress of the "Ricky Ray Hemophilia Relief Act"; and
>
> (g) certain persons outside the United States who are neither citizens nor permanent residents and who wished to be included in the settlement should be included.

These objections are further discussed in section 10(E) *infra*.

9. In April 1997, the court received letters from Charles R. Kozak and Thomas W. Mull, two attorneys who represent substantial numbers of class members, asserting that plaintiffs' Steering Committee had not, prior to recommending the settlement, taken adequate account of certain liability theories Messrs. Kozak and Mull believe are substantially more likely to result in recoveries against the defendants than are the theories favored by the Steering Committee. The allegation by Messrs. Kozak and Mull was that, by ignoring the more viable liability theories, the Steering Committee failed in its obligation to obtain the maximum settlement value for the class. obviously, this contention went to the fairness of the proposed settlement, and, after a further exchange of correspondence with Messrs. Kozak and Mull and Mr. David S. Shrager, lead counsel for the class, the court determined that a further fairness hearing was required. That hearing was held on May 6, 1997, pursuant to notice. Mr. Kozak, Mr. Shrager, various members of the Steering Committee, counsel for the defendants, various other attorneys representing class members, and various members of the class appeared and expressed their views. At the conclusion of the hearing, the court was left with no doubt that plaintiffs' Steering Committee was fully aware of the liability theories referred to by Messrs. Kozak and Mull and had fully considered them in determining whether to recommend the settlement. It became clear that, contrary to their assertions, Messrs. Kozak and Mull had no "new information" that was relevant to the fairness of the proposed settlement. In fact, they stated that they were not opposing the settlement but instead were only urging the court to permit late opt-outs on the basis

that the class had only recently been advised of the "new information" they had supplied. For a number of reasons the court explained at the conclusion of the session, this suggestion was rejected.

10. The court has considered the settlement guided by the factors set forth in *Gautreaux v. Pierce*, 690 F.2d 616, 631 (7th Cir. 1982). *See also Donovan v. The State of Fitzsimmons*, 778 F.2d 298, 308 (7th Cir. 1985). These include the following factors:

(A) 'The Strength of Plaintiffs' Case on Merits

Most class members are faced with significant problems of limitations, proximate cause and product identification, as well as the task of persuading a jury that defendants should be found negligent on the basis of acts and omissions that preceded discovery of the AIDS virus. (Only a few jurisdictions recognize strict liability in blood product cases.) These challenges have largely accounted for the fact that, of the 13 cases tried prior to preliminary approval of the settlement, 12 resulted in defense judgments. In one of those cases, a Jury verdict for the plaintiff was set aside and that decision was affirmed on appeal. *Jones v. Miles Lab, Inc.*, 705 F.Supp. 561 (N.D. Ga. 1987), *aff'd.* 887 F.2d. 1576 (11th Cir. 1989). Two of the 13 cases were reversed on appeal (one is currently subject to retrial). In one of them, plaintiffs had prevailed at trial, *Christopher v. Cutter Lab*, 53 F.3d 1184 (11th Cir. 1995), and in the other case, defendants had prevailed. *Gruca v. Alpha Therapeutic Corp.*, 51 F.3d 638 (7th Cir. 1995).

After preliminary approval of the settlement, two additional cases have been tried to verdict. In the first,

JKB v. Armour Pharmaceutical Co., No. 49D01 9312-CT-1236 (Marion Superior Court, Indiana), a $2 million verdict was returned in favor of plaintiffs and against a single defendant. There was no issue as to product identification. The plaintiff's decedent was a minor and therefore there were no. arguable statute of limitations issues. Indiana has a strict products liability statute, Ind. Code § 33-1-1.5-1. The jury returned a general verdict, without differentiating between negligence or strict liability. The judgment is subject to appeal.

In the second case, *Howray and Brown v. Alpha Therapeutic and Armour Corp.* in the District Court for Harris County, Case No. 94-049929-A, a verdict was returned in favor of both defendants, Alpha and Armour, and against two infected plaintiffs, after four weeks of trial.

The results of the trials to date favor approval of the settlement because the settlement is a guaranteed sum certain for claimants who have elected to participate.

(B) Stage of Proceedings and Amount of Discovery Completed

This MDL litigation consists of over 200 federal law suits which have been consolidated for pretrial discovery purposes by the Judicial Panel on Multidistrict Litigation. Over the past three years, the parties have vigorously pursued discovery on the "core subjects" delineated in Pretrial Order No. 2, at ¶ 10, and thereafter modified by subsequent rulings. Those core subjects include: the use of, source and identification of blood and blood derivatives; viral infectivity of blood and blood derivatives used by plaintiffs; laboratory tests and results regarding

plaintiffs' HIV infection; general nature and treatment of hemophilia; knowledge concerning the risk of viral infectivity and HIV; warnings and information regarding viral infectivity and HIV; plasma collection practices, including donor screening; and viral inactivation. The Settlement Agreement was signed as that core discovery was being concluded.

The plaintiffs' Document Depository contains over 1.5 million pages of documents which have been reviewed and coded by plaintiffs' attorneys. The depository also contains over 850 deposition and trial transcripts which have been analyzed and digested by plaintiffs' counsel. In addition, the plaintiffs' Steering Committee has prepared for and taken or defended over 170 depositions. Records have been inspected in the United States and in Europe. Dozens of court hearings and pretrial conferences have been held and there have been numerous rulings on contested issues. The docket is over 70 single-spaced pages, one indicator of the extent of this controversy. It also reveals that almost 100 discovery motions have been adjudicated. It is abundantly clear that the proceedings are sufficiently advanced to allow the parties to fairly evaluate the settlement.

(C) The Complexity, Length, and Expense of Continued Litigation

This factor is to some extent addressed in (B) above. There are hundreds of filed lawsuits in state and federal courts which will be resolved through this settlement. Over 6,000 claims have been submitted to the Claims Administrator. If the filed lawsuits (putting aside the

claims which have not yet become lawsuits) were each to be tried individually, it would be at an enormous cost to the state and federal judiciary and to all parties. This factor favors approval of the settlement.

(D) The Absence of Collusion and the Opinion of Competent Counsel

The court is fully confident that there has been no collusion between class counsel and the defendants. Class counsel are competent and have conducted this litigation vigorously for the past four years. The court has had many opportunities to observe counsel since 1993 when the MDL was formed. The virtually unanimous support of plaintiffs' counsel for the settlement is a factor favoring its approval.

(E) The Degree of Opposition to the Settlement

There has been very limited opposition to the settlement. This court has seriously considered and weighed each objection and has determined, after careful review, that the objections do not require rejection of the settlement.

At the time of the November 25, 1996, fairness hearing, 52 persons had criticized or objected to the settlement. Most of the objections were in the form of letters, as opposed to formal court filings. These can be grouped into seven categories:

(1) The first group considers $100,000.00 to be inadequate for the loss suffered. In truth, this court would find it difficult to determine that

any particular amount is adequate to reimburse a spouse for the loss of a loved one, a child for the loss of a parent, or a parent for the loss of a child. But in our legal system, a monetary amount is frequently assigned to such claims for purposes of settlement. The court has considered many factors, including the results of the trials to date, defenses which might result in grants of summary judgment or defense verdicts, statutes of limitation, product identification problems, blood shield statutes, learned intermediary and other defenses. The court also notes that over 90 percent of potential class members have elected to participate in the settlement. While the court appreciates the difficultly in assigning a value to claims such as those asserted here, and understands that a $100,000.00 payment is modest for the injuries suffered by the class members, it has determined, under all the circumstances and considering all the relevant factors, that objections based upon the amount of the monetary payment are not a basis on which to disapprove the settlement.

(2) The second cluster of objections concerns subrogation and medical liens. As stated in the class notice, the settlement is conditioned on resolving issues relating to reimbursement and subrogation claims that might possibly be asserted – in which part or all of the $100,000.00 payment could be claimed by various public or private sector healthcare reimbursers or insurers, including Medicare and Medicaid – and issues relating to class members' continuing eligibility for government programs such as Medicare or Medicaid payments. As stated in the notice, if these issues were not satisfactorily

resolved, this settlement would not go forward. Since satisfaction of subrogation and medical liens is a condition precedent to the settlement becoming final, the parties have worked for many months to accomplish that end. These issues have been resolved to the satisfaction of the parties and the court finds that the resolution of these issues is fair and reasonable. Therefore, these objections are moot.

(3) The third cluster of objections relate to Von Willebrand disease. The signatory parties to the Settlement Agreement take the position that persons infected with Von Willebrand disease are not class members and that the settlement was not intended to apply to such persons. This question of whether the Von Willebrand claimants are class members will be resolved in the claims' resolution procedure established pursuant to the Settlement Agreement and need not interfere with or delay approval of the settlement.

(4) The fourth set of objections relates to the concept of a "Claimant Group" pursuant to which claims are to be submitted on behalf of an entire Claimant Group (including spouses and children). It is the HIV infection of an eligible class member which results in the settlement payment. That settlement payment was offered in connection with the claim of each infected person, including his or her Claimant Group. The Claimant Group could either reject or accept the settlement. The court believes that a settlement whereby each member of the Claimant Group would be eligible for a separate $100,000.00 payment could not have been accomplished and thus, had plaintiffs insisted

upon that approach, there would have been no settlement payment at all. Rejecting the entire settlement would be unfair to the thousands of persons who seek to participate in the settlement, and the court rejects that alternative.

(5) The fifth group of objections was filed by a few persons who litigated and lost their cases prior to execution of the Settlement Agreement. The defendants were steadfast in their refusal to include these persons. Considering the benefits to the thousands of class members who wish to accept the settlement, the court will not reject the settlement because it does not include these persons.

(6) The sixth category of objectors does not actually oppose the present settlement but seeks instead to link its approval with congressional passage of the "Ricky Ray Hemophilia Relief Act," whereby it is proposed that the federal government would pay $125,000.00 to each person infected with HIV through the use of factor concentrate. Whatever may be the merits of this proposal, it is not the province of the court to engage in efforts to promote passage of legislation in Congress. The court does not find this objection to be a reason for disapproving the settlement.

(7) The seventh and final group of objections is presented by persons who are not citizens of the United States or permanent residents, and are therefore excluded from the class definition. (Since these persons are not class members, they are technically not objectors.) The parties are entitled to determine the parameters of the Settlement Agreement. The court does not consider it unreasonable to limit

the settlement to United States citizens or permanent residents of the United States, its possessions and territories, and will not reject the settlement based on this objection.

There were separate objections filed by Attorney James Carney, and the court ordered additional submissions in response to these objections. The court has determined that those objections, which were based on Mr. Carney's mistaken belief that there was significant evidence of liability that was unknown to plaintiffs' counsel, are without merit.

11. At the suggestion of plaintiffs' Steering Committee, the court appointed Robert K. Jenner as Guardian Ad Litem to represent class members who are minors or persons under disabilities. Mr. Jenner has represented plaintiffs in this litigation, has written a number of published articles about the legal questions presented and is well qualified to serve as Guardian. He has filed a thoughtful report, analyzing the liability issues and the difficulties of proof. He expresses the opinion that the settlement is fair and recommends it be approved. The report of the Guardian Ad Litem is approved.

12. The settlement does not satisfy everyone. Few class settlements do. But this settlement ends years of litigation and provides redress for thousands of claimants. Subsequent to the November 25, 1996, fairness hearing, the court has received numerous letters from class members supporting the settlement and earnestly requesting that it be approved as soon as possible. The court finds that class members have had an adequate opportunity to consider their individual circumstances, and to decide, in light of those circumstances, whether

their interests are better served by participating in the class settlement or by opting out and pursuing individual claims. The court concludes that the Settlement Agreement among the parties is fair and reasonable for the Settlement Class Members and is in accordance with Rule 23 of the Federal Rules of Civil Procedure. Accordingly, the settlement is approved.

13. The court orders the respective parties to implement the Settlement Agreement according to its terms.

14. The court finds and hereby orders that all members of the Settlement Class who have not filed a timely notice of exclusion from the Settlement Class have for themselves and any party claiming through them released and forever discharged the fractionator defendants and their present and former corporate parents, subsidiaries, affiliates, partners and joint venturers, as well as suppliers to the fractionators and distributors for the fractionators, as well as all directors, officers, employees, agents, insurers, and counsel for the foregoing, as well as their predecessors and successors. The release and covenant not to sue shall be for all claims arising out of all injury, disease or harm of any kind that the HIV infected person and members of such person's Claimant Group allegedly suffered as a result of use of Factor Concentrate processed or distributed during the period from 1978 through 1985, as described in the Settlement Agreement, and such persons are forever barred from instituting, assigning, maintaining, collecting or prosecuting, claims against defendants.

15. The court finds and hereby orders that neither this Final Order and Judgment nor the Settlement Agreement shall constitute or be interpreted to be a finding of the validity or invalidity of any claim or defense or any cause of action alleged or pleaded in the litigation.

16. The court finds and hereby orders that neither this Final Order and Judgment nor the Settlement Agreement, or any fact, conduct or act involving the settlement proceedings shall be offered or received in any proceeding as evidence, an admission, an inference or presumption, except as may be necessary to enforce or consummate the Settlement Agreement or to support a defense of release or other theory of claim preclusion, issue preclusion or similar defense.

17. The court finds and hereby orders that any person who has heretofore submitted a timely and valid request for exclusion from the Settlement Class will not be bound or affected by the Settlement Agreement or any release or discharge as provided in the Settlement Agreement or in this Final Order and Judgment. The schedule of those persons who have heretofore submitted timely and valid requests for exclusion from the Settlement Class will be filed under seal by the Claims Administrator.

18. The court intends that a separate court order shall be entered regarding attorney fees and reimbursement of expenses to attorneys and law firms representing the Settlement Class. The court finds that the creation of the separate $40 million fund by defendants, from which plaintiffs' attorney fees are to be paid in amounts determined to be reasonable by the court, is fair and

reasonable to the Class. The court reserves its decision as to the allocation of the fund. The separate order for attorney fees and expenses shall not affect or disturb this Final Order and Judgment or any of the findings or orders included in this Final Order and Judgment.

19. Without affecting the finality of this Final Order and Judgment, the court reserves exclusive and continuing jurisdiction over these consolidated actions, the representative plaintiff, the Settlement Class Members, fractionator defendants, and each and all of their respective attorneys and law firms, for the purposes of supervising or determining the implementation, enforcement, construction and interpretation of the Settlement Agreement and all orders heretofore entered, for hearing and determining any motion or application by attorneys or law firms for an award of attorney fees and expenses, and for hearing and determining the final plan of allocation of the settlement.

20. The court finds and hereby orders that this Final Order and Judgment, and all the findings and orders included herein constitute a Final order and Judgment, and the court determines that there is no just reason for delay and directs entry of the Final Order and Judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

DATED: May 8, 1997

ENTER: /s/ John F. Grady
John F. Grady, United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE FACTOR VIII OR IX CONCENTRATE BLOOD PRODUCTS PRODUCTS LIABILITY LITIGATION	)))))))	MDL – 986 No. 93 C 7452 Chicago, Illinois September 5, 1997 10:20 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN F. GRADY

APPEARANCES:

For the Plaintiffs: SHRAGER, MC DAID, LOFTUS, FLUM & SPIVEY
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PO Box 12308
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Pensacola, Florida
32581, by

MR. JAMES R. GREEN

* * *

[p. 115] Court to cancel a trial date, and they attempted to again overthrow the committee because we were not pursuing certiorari to the Supreme Court to set aside the Seventh Circuit opinion, which he now refers to in support of an argument to enhance his clients' financial interest in the fund.

So let me get to the question. The question was what work should be covered. We all agree on two categories. One, we all agree that the negotiation, processing, the effectuation of the settlement; that is, the class action work, is, of course, to be covered. There is no dispute. That work, I would point out, however, continues. So it is past work and future work. The payment process that we are now in could be as difficult and thorny as even the work which preceded it, and it was, I assure your Honor, complicated and extending over many, many months.

Secondly, there is what the Court called, and I think it is a good label, the hometown lawyer efforts. This is work by attorneys on cases that –

THE COURT: By the way, I want to credit Judge Bechtel for that phrase, hometown. He has talked about that at our MDL meetings, and it seems to me a good,

useful designation and tells you who we are talking about.

MR. SHRAGER: Right, it is descriptive.

And what you have there are two, really two, categories when you think about it. You have got the hometown

* * *

[p. 118] number, Roy, I would be happy to fax you on that letter.

. here is then the third category to be covered, to go back to the Court's question. It is the most important category. And it is one in which obviously Mr. Berkman has been struggling and, if I may say, waffling a bit. He takes the position, and; that is, what about the MDL work that brought this about; what about what happened in the year starting in – I guess we were formally organized in 1994, '95, '96, into August, when an agreement is ultimately negotiated – what about the work that went up to that point and that now continues?

He has suggested, if I may say, very cleverly a position that between the lines goes as follows. On top of the lines, what he says is let's wait until the opt-out and see who is in the settlement. And Mr. Beck echoes that, too. What they have in mind, Judge, is returning to find out who supported the settlement and who didn't as they see it.

I want to recall for the Court that when this case was negotiated, under its terms, and as Rick Berkman has so many times said today, the master document, the defendants had the option at our suggestion and advice, which they ultimately accepted, to look at those who decided to

participate, the number of opt-outs, and decide whether they wished to proceed. There were, I believe, about 800 lawsuit cases.

I don't know how many, 600 went in, a couple hundred [p. 119] others were started. There's now about 550 opt-outs. I predict by the time they are done there may be conceivably, conceivably, over 200 opt-outs. A lot of those cases will fold when push comes to shove. But what argument they are really making is that they want to be able to find out who put cases in and who didn't.

THE COURT: I am not sure I follow.

MR. SHRAGER: They want to find out how many – in other words, if we would put in – if we could tell them today that all but 50 cases were going into the settlement, Rick Berkman would get up and stipulate that we should get the entire $40 million fund. There would be no doubt about it, and he will agree to that. He will agree to that. He has told me that many times. He has been totally candid with us.

What they are saying is, and this is where, frankly, they get stuck in their own position, the MDL effort is entitled to credit to the extent it – a common effort produced a common benefit to the class that came into being. That is fundamental. The fact that cases opted out, some number of cases opted out, that is endemic in any class settlement. So a number of cases are out. It is a number that the defendants accepted as reasonable when they decided to go forward with the offer.

The question of what should go in in terms of the MDL effort to me is a question simple to answer: A fair proportion

* * *

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FAX: (520) 577-7009

October 24, 1997

LETTER WITHOUT EXHIBITS VIA TELEFAX;
LETTER WITH EXHIBITS VIA MAIL, MONDAY DELIVERY

The Honorable John F. Grady
United States District Judge
U.S. District Court
Northern District of Illinois
219 South Dearborn Street
Chicago, IL 60604

Dear Judge Grady:

Thank you for your October 23, 1997, letter. Rose Marie Ibánez and I (hereafter "counsel") understand that it is your obligation to monitor these matters. I enclose, as "Exhibit "A," counsel's first response to Mr. Murphy's ridiculous allegations. However, because of the fractionators' manipulations, which will be fully explained below, counsel must now more fully respond. We ask, however, that this letter be placed in the file under seal, denoting that it shall not be republished or ever used in any way to prejudice Mr. Murphy. We will be sending a separate letter to you and the Honorable Bernardo Velasco only that will further illuminate the fallaciousness of Mr. Murphy's allegations. We request that you consider the instant letter as a supplement to our Response and Counter-Motions to the fractionators' Motion To Enforce Order.

As Your Honor will see from the documents submitted herewith, the fractionators knew or reasonably

should have known that Mr. Murphy's letter contained falsehoods from the moment they received it. Their republication of the letter in these circumstances in unethical, illegal, and is additional proof of the bad intent alleged in our Response and Counter-Motions to the fractionators' Motion To Enforce Order.

Mr. Murphy alleges that counsel did not timely disclose to him the new opt-in option. He states he learned about it "a couple weeks ago" from September 13, 1997. This is unlikely, however, unless, which is even more unlikely, Mr. Murphy has a direct pipeline into the fractionators' or Steering Committee Lead Counsel's office. (It does appear, however, that Mr. Murphy is obtaining erroneous "legal" advice from some third party, and we will be conducting discovery on this matter.) Counsel first became aware of the new option as a choice rather than a rumor at the September 5, 1997, hearing before Your Honor. At that time, I requested a copy of the pertinent correspondence. (See transcript pages, Exhibit "B" hereto.) Then, on September 8, 1997, counsel received the relevant communication, an August 28, 1997, letter from the MDL Plaintiffs' Steering Committee's lead Counsel David Shrager to "Attorneys Representing Persons Who Previously Opted Out of the Class Action Settlement." (Exhibit "C," date-stamped correspondence.)

This correspondence did not make clear, however, whether persons (such as Richard Murphy) who had already lost on summary judgment were eligible. In the first opt-in period, counsel had attempted to opt-in one of our clients who had lost on summary judgment, and, at that time, counsel were told that such persons were not eligible. Therefore, on September 12, 1997, Rose Ibánez

wrote to Claims Administrator, Special Settlement Counsel, *and Sarah Gourley, counsel for the Fractionators,* stating: "Are my clients who were found to be barred by the Statute of limitations but had appeals pending at the time the original offer to opt-in was sent now eligible to opt-in even though at the earlier time I was told they were not eligible?" (Exhibit "D.") Having not received an answer after more than two weeks, Rose Ibánez wrote (via telefax) again to the same persons: "May I please have a response to my enclosed September 12, 1997 letter?" (Exhibit "E.")

Moreover, although counsel did not want to get our clients who fit within the just described category to raise their hopes only to be disappointed by being told later that they were not eligible, we felt we had to approach them at this point. Therefore, counsel finally reached Mr. Murphy on October 2, 1997. He decided to opt-in, and Rose Ibánez faxed a letter to that effect to the Special Settlement Counsel that very date. (Exhibit "F.") In other words, Mr. Murphy was fully informed about his *possible* eligibility and prophylactically opted-in before counsel were even informed about his eligibility and many days prior to Judge Velasco's October 8, 1997, letter to all counsel. *Counsel's inquiry regarding the eligibility of person's in Mr. Murphy's shoes has still not been answered, and we request that Your Honor Order the fractionators to immediately respond.* Mr. Murphy needs the answer forthwith so he can make decisions – such as probable retention of new counsel – with full information.

Thus, Your Honor, the fractionators knew or had direct access to the information about Mr. Murphy's attempted opt-in many days before when they received

Mr. Murphy's letter from Judge Velasco. Furthermore, Your Honor, all the fractionators had been apprised on October 4, 1997, by the enclosed pleading (Exhibit "G") that one of counsel's Hispanic clients was opting in this go around. Therefore, there was absolutely no reason for the fractionators to give any credence to Mr. Murphy's unsubstantiated "suspicion" that our clients were not being given information about the new opt-in opportunity.

The fractionators also knew or reasonably should have known that Mr. Murphy's allegation that "a disproportionately large number of plaintiffs, especially in the Tucson area, opted out of the settlement last year." Of course, the fractionators believe that virtually all opt-outs are disproportionate, but they knew our clients have opted-in and out proportionate to the ratios among those represented by responsible counsel all over the country and after being given information based on criteria espoused by Mr. Shrager and others. Indeed, these criteria were long ago articulated in open court when the Honorable Pima County Superior Court Judge Robert Buchanan ordered us to indicate which clients would opt-out were Your Honor to approve the sending of election papers within the litigation class.

Why, then, Your Honor did the fractionators further publish Mr. Murphy's letter when they knew it was filled with error? They did it to drive a wedge between us and our clients so as to encourage opt-ins and to discredit us as a viable source of opposition and disclosure of the truth about their heinous conduct. On the latter point, consider Exhibit "H,") the affidavit of Dr. Thomas Asher that counsel just obtained for the Arizona litigation. Dr.

Asher formerly worked for one of the fractionators and the CDC, he was on the Board of Directors of the American Blood Resources Association, he was the CEO of his own blood company in the 1970's and 1980's, and he opines that the fractionators' probable conduct was in conscious disregard of serious danger to consumers. We have also retained for the Arizona litigation Professor Clark Havighurst of Duke University Law School, who is the leading health care antitrust authority in the United States. He has pointed that the fractionators violated the U.S. antitrust laws by acting in concert to squelch competition as to safety of commercial factor concentrates.

Counsel believe the above should answer your concerns *and* buttress our previous request for sanctions against the fractionators. However, if you wish and you provide us immunity from any charge of breaching attorney-client confidentiality, we will forward copies of letters we sent to each client confirming their election whether to opt-in or opt-out in this latest election period.

Sincerely,

/s/ Roy G. Spece
Roy G. Spece, Jr.

RGS:mhs
encs.
cc: Hon. Bernardo P. Velasco; David Shrager, Esq.; Geoffrey Smith, Esq.; and Mr. Richard Murphy

EXHIBIT 8

FACTOR CONCENTRATE LITIGATION RELEASE

FOR CLAIM NUMBER(S): _____
FOR HIV-POSITIVE PERSON: _____

THIS RELEASE (hereafter the "Release") is entered into as of the date of the last signature below by and between all individuals who have signed this Release (including but not limited to all Releasors identified on Exhibit A attached), (these individuals, including all Claimants and other members of the Claimant's Group, collectively referred to as "Releasors") and ALPHA THERAPEUTIC CORPORATION, GREEN CROSS CORPORATION OF AMERICA and THE GREEN CROSS CORPORATION (collectively, "Alpha"), ARMOUR PHARMACEUTICAL COMPANY, RHONE-POULENC FORER INC. (collectively, "Armour"), BAXTER HEALTHCARE CORPORATION and BAXTER INTERNATIONAL, INC., (collectively, "Baxter"; which shall also refer to Travenol Laboratories, Inc., and Hyland Therapeutics, a division of Baxter Healthcare Corporation), BAYER CORPORATION and BAYER A.G. (collectively, "Bayer"; which shall also refer to Cutter Laboratories, Inc., Cutter Laboratories, a division of Miles, Inc., Miles Laboratories, Inc., Miles, Inc. and Miles Inc.) [Alpha, Armour, Baxter and Bayer are hereafter referred to as the "Fractionators" or "Released Parties"]. Releasors and Released Parties are collectively referred to as "the Parties."

WHEREAS, some or all of Releasors may have certain claims arising under their own individual suits (if any)

against one or more of the Released Parties and/or any purported class actions including, but not limited to, the class action suit styled *Walker v. Bayer Corp., et al.*, filed in the United States District Court for the Northern District of Illinois, as Civil Action No. 96C 5024 (these individual and class actions collectively referred to as the "Litigation"); and

WHEREAS, the Litigation against Released Parties seeks damages allegedly sustained by one or more of Releasors as a result of an alleged infection with the HIV virus and other viruses related to plasma factor concentrates and derivatives used for the treatment of hemophilia during the period 1978 through 1985 (hereafter "Factor Concentrates") processed or distributed by any or all of the Released Parties (hereinafter referred to as the "Incident"); and

WHEREAS, Released Parties have denied and continue to deny that they have any liability to Releasors as a result of the Incident or with respect to any claims asserted in the Litigation; and

WHEREAS, the government of the United States of America, certain relevant state governments, and certain private health insurance providers have agreed to release certain rights those governments or insurers have or may have had to reimbursement/subrogation from Releasors and Released Parties for payments made on behalf of any of Releasors to medical treaters through Medicare, Medicaid and/or certain other federal and state funded health care plans and private insurance programs; and

WHEREAS, the Parties, having been provided with notice of and agreeing with and accepting the terms and

provisions of the Factor Concentrate Litigation Settlement Agreement (the "Agreement" with the terms as defined therein being applicable in this Release) approved by The Honorable Judge John Grady in the Litigation currently pending in the United States District Court for the Northern District of Illinois, Eastern Division; and

WHEREAS, Releasors, voluntarily and with full knowledge of their rights and the provisions of this Release, and having had the opportunity to obtain the benefit of the advice of counsel, now wish to settle, compromise, and dispose of the above-described claims and the Litigation, and any other claims that they have or might have against Released Parties related to the Incident upon the terms and conditions set forth below; and

WHEREAS, in the absence of a fully executed Release from Releasors, Releasors will not receive payment under the Agreement or be entitled to any of the other benefits of the settlement. Furthermore, Releasors acknowledge that as to a Claimant or Claimant Group member who does not sign this Release and who pursues a lawsuit against the Fractionators related to the Incident, the Fractionators may assert, and a court may decide, that any such lawsuit is barred by the failure of the Claimant or Claimant Group member to exclude himself from the settlement (to "opt out") prior to October 15, 1996; and

WHEREAS, Released Parties, without any admission of liability, now desire to settle, compromise, and dispose of the above-described claims and the Litigation upon the terms and conditions set forth below.

NOW, THEREFORE, in consideration of the above premises and the mutual covenants, and intending to be

legally bound thereby, as well as in consideration of the Settlement Consideration set forth below, the Parties enter into the following agreement:

1. Releasors, for themselves, and their heirs, personal representatives, common law and statutory beneficiaries, survivors, successors, subrogees and assigns do hereby forever remise, release, acquit, and discharge Released Parties, and all of their present and former corporate parents, subsidiaries, affiliates, partners and joint venturers, as well as all suppliers to Released Parties and distributors for Released Parties, as well as all directors, officers, employees, agents, shareholders, insurers and counsel of each of the foregoing as well as their predecessors and successors, from any and all causes of action and damages (including without limitation damages for emotional injuries), and other liability or relief of any nature whatsoever, past, present or future, whether known or unknown, foreseen or unforeseen, whether in law or in equity, that Releasors ever had, now have, or hereafter may have, by reason of or arising out of any matter, cause, or event occurring on or prior to the date of this Release, arising out of or in any way relating to the Incident. It is expressly understood and agreed by Releasors that this is a full and final release of all matters whatsoever relating to the Incident as to Released Parties and is intended to and does embrace not only all known and anticipated damages and injuries, but also unknown and unanticipated damages, injuries, or complications that may later develop or be discovered, including all effects and consequences thereof.

2. It is the intention of the Parties and is understood by Releasors that this Release will forever bar Releasors

and anyone claiming through them from maintaining any action or claim whatsoever against any and all Released Parties which arose or which might arise in the future from any acts, omissions, agreements, or other occurrences relating to the Incident. The Parties intend that Released Parties obtain through this Release total and final peace, satisfaction and protection from any liability arising from any and all claims of Releasors and anyone claiming through them, whether or not previously asserted; and from any and all claims for joint tortfeasor liability, contribution or indemnity, including claims by any subrogees or assignees of any of Releasors, asserted by any person or entities arising from the Incident or which was or could have been asserted in the Litigation. The Parties further intend to exercise their best efforts to obviate the necessity and expense of Released Parties appearing in and defending any action commenced by any of the Releasors and anyone claiming by or through them asserting claims against any other person or entity arising from the Incident, or which could have been asserted in the Litigation. (Such other unreleased persons or entities are hereafter referred to, along with all subrogees and/or assignees of Releasors, as "Third Parties".)

3. The intent of the Parties is to protect Released Parties to the maximum extent possible, from any liability for contribution or indemnification claims that might otherwise be asserted by Third Parties who have been sued or may in the future be sued by Releasors for the Incident. The effect of this Release shall be to reduce any judgment obtained by any Releasor against any such Third Party by the amount, percentage or share of such

judgment attributable to Released Parties as may be necessary to bar, discharge, and release under applicable law any claims for contribution or indemnification against Released Parties arising from or related to the claims. In the event that any Releasor obtains a judgment against a Third Party and such Third Party obtains a judgment over, in whole or in part, against one or more of Released Parties for contribution or indemnification arising from the claims, then Releasors will be required to reduce or remit any judgment or portion thereof obtained from the Third Parties by the amount of the judgment over against Released Parties. To the extent a judgment obtained against any Third Party for the Incident would result in the imposition of liability for contribution or indemnification against the Released Parties, Releasors agree not to enforce any such judgment. In the event Releasors reach a settlement with Third Parties, settlement documents between Releasors and Third Parties shall provide that the Third Parties relinquish any claims for contribution or indemnification for the Incident against Released Parties.

4. Except as set forth in Paragraph 5 below, Releasors reserve the right to assert claims against all Third Parties, including any of the non-released defendants in the Litigation, and reserve also the right to assert claims that those Third Parties, and not the Released Parties, are solely liable for damages arising from the Incident.

5. Releasors agree to waive, release, and discharge any and all rights they may have to assert claims, causes of action, and administrative or other proceedings arising out of Claimant's use of Factor Concentrates, as defined in the Agreement, including, but not limited to, the use,

administration, regulation, processing, and distribution of Factor Concentrates, against the United States of America, its federal employees, representatives, agents, agencies, and instrumentalities, and each and every individual State, Commonwealth, Territory or Possession which by agreement with the Fractionators has released its claims against Releasors to reimbursement and subrogation related to the Agreement. Releasors do not, however, waive any rights that they may have to any entitlement or right to compensation which may be provided after May 1, 1997 by the legislature of any state, federal or other government.

6. As consideration for this Release, Released Parties will provide as described under Paragraph 7 below compensation to Releasors collectively in one of the following ways: (i) in the amount of One Hundred Thousand Dollars ($100,000) or in such lesser amount as Releasors may be entitled to receive under the Agreement paid to the Total Control Account for Releasors; or (ii) in periodic payments that shall have a total cost to Released Parties of One Hundred Thousand Dollars ($100,000) or such lesser amount as Releasors may be entitled to under the Agreement; or (iii) in the amount of One Hundred Thousand Dollars ($100,000) or such lesser amount as Releasors may be entitled to receive paid to the trustee of an "A" or "C" special needs trust for the benefit of Releasors; or (iv) in some combination of (i), (ii) and (iii) having a total cost to Released Parties of One Hundred Thousand Dollars ($100,000) or such lesser amount as Releasors may be entitled to receive under the Agreement

(such lump-sum amount and such cost of periodic payments, or such combination thereof, are hereinafter referred to as the "Settlement Consideration").

The Settlement Consideration provided by the Released Parties to the Releasors as set forth in this Paragraph is not being credited to the account of any Releasor nor being set apart for the Releasors, nor otherwise made available to Releasors so that they may draw upon it at any time. Rather, Releasors' receipt of such Settlement Consideration is conditioned upon the certification by Special Settlement Counsel that appropriate documentation, including this Release, has been provided by, or on behalf of Releasors to that Special Settlement Counsel, along with court approvals where necessary.

7. Released Parties shall pay the Settlement Consideration in accordance with the terms of the Factor Concentrate Litigation Settlement Grantor Trust (hereinafter the "Settlement Grantor Trust"). This Release shall be effective with respect to the Releasors upon the first to occur of the following transfers:

a) The transfer from Metropolitan Life Insurance Company, as issuer of a guaranteed interest contract ("GIC") owned by the Settlement Grantor Trust, to a Total Control Account® for the benefit of the Releasors of the sum of One Hundred Thousand Dollars ($100,000) or such lesser amount as Releasors may be entitled to receive under the Agreement, plus interest thereon in accordance with the terms of the Settlement Grantor Trust.

b) The transfer from (i) MetLife Trust Company, National Association, as trustee of the Settlement Grantor

Trust, to Metropolitan Insurance and Annuity Corporation of the sum of One Hundred Thousand Dollars ($100,000) or a lesser amount in accordance with the terms of the Agreement for a Qualified Assignment Agreement and Release, and (ii) to Metropolitan Life Insurance Company, as issuer of a guaranteed interest contract ("GIC") owned by the Settlement Grantor Trust, to a Total Control Account® for the benefit of the Releasors, of the excess of the amount to which Releasors are entitled under the Agreement over the amount transferred under (b)(i), and the interest on the amounts transferred under (b)(i) and this (b)(ii) in accordance with the terms of the Settlement Grantor Trust.

c) The transfer from MetLife Trust Company, National Association as trustee of the Settlement Grantor Trust to MetLife Trust Company, National Association, as trustee of the "A" or "C" trust for the benefit of the Releasors, of the sum of One Hundred Thousand Dollars ($100,000), or such lesser amount as Releasors may be entitled to under the Agreement, plus interest thereon in accordance with the terms of the Settlement Grantor Trust.

8. Payment of the Settlement Consideration pursuant to the terms of Paragraph 7(a), (b) or (c) above constitutes full and final settlement payment to Releasors. Following such payment, no further payment or consideration of any kind in connection with the termination and settlement of the Litigation is contemplated or required by Releasors. Released Parties bear no responsibility or liability for any failure on the part of the Special Settlement Counsel and/or the Trustee of the Settlement Grantor Trust to properly allocate among

members of a Claimant Group or distribute the Settlement Consideration. The execution of this Release by Releasors is a material inducement to the Released Parties in paying the Settlement Consideration pursuant to the terms of the Agreement and/or the Release.

9. The Parties agree to execute any and all required supplemental documents and to take all steps which may be reasonably necessary to give full force and effect to the terms of this Release and to effect dismissal of all claims and actions against Released Parties, including the Litigation.

10. Except as otherwise set forth in the Agreement, the Parties shall bear their respective costs and attorney fees. The monetary obligations of Released Parties to Releasors' attorneys are expressly limited to the court approved costs and fees as set forth in the Agreement.

11. Releasors represent and warrant that they have full power and authority to make, execute, and deliver this Release, and that to their knowledge and belief no other individual related to the Releasor has a claim against Released Parties arising out of the Incident related to the undersigned Releasors or which could have been raised in the Litigation, which is not here released.

12. Releasors represent and warrant that they have not sold, transferred, conveyed, assigned, or hypothecated any of their rights, either collectively or individually, in whole or in part, in any of the matters released herein.

13. Releasors represent and warrant that they have had an opportunity to consult attorneys of their own

choice to advise them fully of their rights under this Release and the meaning and effects of this Release and that if any Releasor has not consulted an attorney, that Releasor has knowingly and voluntarily elected not to do so.

14. Releasors represent and warrant that they understand that it is their decision and their decision alone whether or not to sign this Release. Releasors further represent and warrant that in agreeing to the terms of this Release, they have not relied on any finding of the fairness of the terms of the Agreement and/or this Release by any Court, including any determinations made by the Court in the *Walker v. Bayer Corp. et. al* action in the United States District Court for the Northern District of Illinois or in the MDL proceedings pending in that same Court. Rather, Releasors have reached their own decisions as to the fairness of the Agreement and this Release in consultation with counsel of their choice or have voluntarily elected not to consult with such counsel. Releasors also represent and warrant that they are not relying on the Court's order barring the filing or pursuit of individual claims and they would agree to the terms of this Release even if the Agreement were not part of a class settlement but rather a completely private settlement.

15. Releasors represent and warrant that to their knowledge and belief, there are no liens or claims of any kind which have not been discharged by a prior agreement and which could be asserted or made against the Settlement Consideration or against Released Parties as a result of any HIV or AIDS-related medical treatment provided to any Releasor other than those private or public

subrogees who have agreed to waive their claims and are identified in the notice sent with this Release to Releasors. If there are any such outstanding liens, Releasors agree to satisfy those liens from the Settlement Consideration.

16. If any provision or any part of any provision of this Release shall for any reason be held to be invalid, unenforceable, or contrary to public policy or any law, then the remainder of this Release shall not be affected, provided that the portion which is held invalid, unenforceable, or contrary to public policy or law does not constitute a material part of the consideration of one of the Parties.

17. Releasors state that they have carefully read this Release, have signed it as their own free act, and intend to be legally bound thereby. This Release is not subject to any assertion of mistake of fact or law.

18. Releasors declare and understand that no promises, inducements, or agreements not herein expressed have been made to them and that this Release contains the entire agreement among the Parties hereto and that the terms of this Release are contractual, and not a mere recital. Releasors further represent that they are under no legal disability material to their ability to execute this Release.

19. In conjunction with the signing of this Release, Releasors shall also execute the medical release attached as Exhibit B to this Release ("the Medical Release") which will authorize the release of certain medical records necessary for the finalization of the settlement. The Medical Release shall be subject to all of the strict confidentiality

provisions of the Agreement, and will be used for no other purpose than the implementation of this settlement.

20. Because this Release applies to persons throughout the United States, to ensure uniformity in interpretation and to take advantage of a highly developed body of law familiar to the court presently presiding over *In re Factor VIII or IX Concentrate Blood Products Litigation* MDL-986, No. 93-C7452 (N.D. Ill.) and *Walker v. Bayer Corp. et al.*, No. 96C 5024 (N.D. Ill.), which has jurisdiction over all of the Parties, this Release was negotiated with counsel in those cases and shall be construed and interpreted in accordance with the laws of the State of Illinois (excluding Illinois choice of law rules).

21. This Release may be executed in counterparts, each of which is to be an exact copy of the original Release and each of which shall constitute an original, and all of which shall constitute one and the same instrument. This Release shall become effective and binding, subject to all conditions set forth herein, when it has been executed, in counterparts or otherwise, by all Releasors.

IN WITNESS WHEREOF, and intending to be legally bound hereby, the Releasors have executed this Release as of the date of the last signature.

PLEASE READ ENTIRE AGREEMENT BEFORE SIGNING

Releasors

Signature

Name (Print or Type)

Social Security Number

Date Signed

I, the undersigned a notary public in and for said county in said state, hereby certify that _____ whose name is signed to the foregoing Factor Concentrate Litigation Release and who is known to me, acknowledged before me on this date, that he/she had the opportunity to read the Release, and being informed of the contents of the same, he/she executed the same voluntarily on this date.

Notary Public
State of
My Commission Expires:

Signature

Name (Print or Type)

Social Security Number

Date Signed

I, the undersigned a notary public in and for said county in said state, hereby certify that _____ whose name is signed to the foregoing Factor Concentrate Litigation Release and who is known to me, acknowledged before me on this date, that he/she had the opportunity to read the Release, and being informed of the contents of the same, he/she executed the same voluntarily on this date.

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Notary Public
State of
My Commission Expires:

STATE OF LOUISIANA

PARISH OF ST. TAMMANY

22ND JUDICIAL DISTRICT COURT

SCOTT HARPER AND MULL & MULL,	*	NO. 98-10058
	*	DIVISION H
--vs.--	*	JUDGE _____
ALPHA THERAPEUTIC CORPORATION, BAXTER HEALTHCARE COMPANY, RHONE-POULENC RORER, INC., and BAYER CORPORATION	*	

****

ORIGINAL PETITION

DATE: January 6, 1998 FILED: _____

NOW INTO COURT, through undersigned counsel, come Scott Harper, an individual of the age of majority and a resident of California, and the law firm of Mull & Mull, a professional legal corporation licensed to do business and doing business in Covington, Louisiana (hereafter Mull & Mull"), who respectfully represent that the named Defendants herein are indebted unto them, jointly, severally and *in solido*, for the following reasons and in the following respects, to-wit:

1.

Made Defendants in this action are:

A. Rhone-Poulenc Rorer, Inc., parent of and Armour Pharmaceutical Company, a corporation organized to do business under the laws of the State of New York, licensed to do business and doing business in the State of Louisiana, and having as its national principal place of business the State of Pennsylvania;

B. Bayer Corporation, a corporation organized to do business under the laws of the State of Indiana, licensed to do business and doing business in the State of Louisiana, with its national principal place of business in the State of Indiana;

C. Baxter Healthcare Corporation, a corporation organized to do business under the laws of the State of Delaware, licensed to do business and doing business in the State of Louisiana, with its principal place of business in the State of Illinois;

D. Alpha Therapeutic Corporation, a corporation organized to do business under the laws of the State of California, licensed to do business and doing business in the State of Louisiana, with its principal place of business in the State of California.

2.

Venue over this petition for damages and to enforce a contract is proper pursuant to Louisiana Code of Civil Procedure Article 74 and Article 76.1.

3.

Defendants were and are manufacturers of Factor VIII and/or IX, a blood concentrate product designed to aid hemophiliacs in supplementing the enzyme necessary to clot their blood and prevent excessive bleeding.

4.

By virtue of written contingency fee contracts, Mull & Mull acted as attorney of record for the persons listed on Exhibit "A," attached hereto and incorporated herein for all purposes. Mull & Mull has asserted claims in Louisiana courts on behalf of the persons listed and against the Defendants for injury resulting from the Defendants' manufacture and sale of Factor VIII and Factor IX blood concentrate that was contaminated with the HIV virus.

5.

Defendants were aware that Mull & Mull represented these individuals at all time pertinent hereto.

6.

In January of 1996, Thomas W. Mull of Mull & Mull began negotiations with all four of the defendants on behalf of the firm's individual clients and on behalf of the Committee of Ten Thousand, a non-profit organization composed of affected members of the hemophilia community. After a series of lengthy meetings in March of 1996, Mr. Mull secured an offer of settlement from Baxter in the amount of $50,000 for each person infected with

HIV who had taken Baxter product, plus any attorneys fees that might be owed by such persons up the 1/3 of their recovery.

7.

Subsequently, both Alpha and Armour contacted Mr. Mull and proposed in principal to match Baxter's offer. This settlement would have meant that the defendants would pay each claimant $150,000 plus attorneys fees up to $50,000 in settlement of their claims.

8.

Prior to conclusion of the negotiations, however, Bayer contacted Mr. Mull and proposed that he abandon his efforts at negotiation with each defendant separately, in favor of a "global" settlement funded by all four defendants.

9.

Mull & Mull's resistance to such an approach was met by an assurance from Baxter and Cutter that the offer would be in an amount that they "could not refuse," which Mr. Mull assumed to mean that the offer would be in the neighborhood of the $250,000 settlements that the defendants had previously confected with the hemophiliac community in Japan.

10.

Defendants and their counsel then violated Rule 4.2 of the Model and Louisiana Rules of Professional Conduct by making a direct offer to plaintiff's clients, through a national advertisement in the Wall Street Journal, of a "global" settlement to all infected members of the hemophiliac community, which offer materially deviated from the terms of the negotiations that had previously been ongoing between Mr. Mull and the defendants, in the following respects:

A. Despite the fact that a previous national class action (*"Wadleigh v. Rhone-Poulenc Rorer, Inc."*) in favor of all persons to whom the offer was made had been decertified by the Seventh Circuit Court of Appeal on the ground of its inability to qualify under Federal Rule of Civil Procedure 23, which decertification had prompted the settlement discussions that had begun in January, the defendants proposed in their new offer to utilize the class action format once again, and this time to seek certification of a "settlement only" class which class would include all of Mull & Mull's clients who elected to participate, with class counsel to be the lead counsel for the Plaintiffs' Steering Committee ("PSC") in the new class action, despite the fact that said counsel had no relationship with nor authority to negotiate on behalf of Mull & Mull's clients, and acted only on behalf of those clients whom members of the PSC had personally undertaken to represent.

B. The offer was in the amount of $100,000 per claimant, "net of attorneys fees," up to a ceiling of $600,000,000, plus up to $40,000,000 in attorneys fees and costs, an amount significantly less than that to Baxter, Alpha & Armour had previously agreed.

11.

In May of 1995, the Plaintiffs Steering Committee had written a letter to all defendants, stating that the decertification of the *Wadleigh* class action meant that they no longer represented the interests of any member of the hemophiliac community. Nonetheless, the defendants disregarded this notification and communicated the offer of $600,000,000 directly to the members of the PSC in the decertified *Wadleigh* class action for acceptance.

12.

Subsequently, the Plaintiffs' Steering Committee publicly announced that it had accepted the defendants' offer on behalf of the hemophiliac community (even though it collectively represented no member of that community nor did it represent any organization of members of that community, such as the Committee of Ten Thousand) and that it would commence the required certification of the "settlement only" class necessary to facilitate the settlement.

13.

On April 15, 1997, a formal "settlement agreement" was signed by the defendants and representatives of the PSC, which settlement agreement attempted to abrogate any contingency fee contracts individual counsel such as Mull & Mull may have had with their clients. Said agreement further attempted to limit attorney recovery of fees to recovery from the $40,000,000 Cost and Fee fund.

14.

Subsequently, the Plaintiffs' Steering Committee filed a new class action (*"Walker"*), designated its lead counsel as "class counsel," and moved to certify a "settlement only" class under Federal Rule of Civil Procedure 23(b)(3).

15.

On August 14, 1996, the United States District Court for the Northern District of Illinois preliminarily approved the settlement, and authorized the mailing of notices to all putative class members affording them the option of accepting the settlement and their portion of its or alternatively pursuing separate claims. This order stated that the Court in the Northern District of Illinois would adjudicate attorney liens and contingency contracts.

16.

By the close of the opt-out period on October 15, 1997, approximately 6000 persons had accepted the

defendants' offer of $100,000, including 318 of Mull & Mull's clients.

17.

On May 8, 1997, the United States District Court for the Northern District of Illinois entered a Final Order and Judgment approving of the settlement to be paid to the claimants, certifying them as a "settlement class," and approving the $40,000,000 Cost and Fee Fund as a "fair and reasonable" amount to be paid to the attorneys involved. The MDL court further ruled that a separate order regarding attorneys fees would be entered on a later date.

18.

The defendants then vitiated and trammeled express orders of the United States District Court for the Northern District of Illinois that the monies tendered in settlement of the claim be distributed forthwith and in conformity with the process created by the Court and counsel for prompt distribution of said tender. They completely abrogated and ignored their attempted "class settlement" in favor of a procedure by which they would only distribute funds to the claimant, including plaintiffs' clients, after said claimant signed a "receipt and release" form which they concocted. Said form completely rejects any notion of a class settlement and attempts to negotiate and settle each individual claim per the terms of a private settlement between the individual claimant and the defendants.

19.

The requested release differs from the original notice sent to all claimants, and thus attempts to alter the terms pursuant to which the claimants accepted defendants' $100,000 offer of settlement, in the following respects:

A) While the original class of individuals included in the attempted class action, and thus those to whom notice was sent, only included hemophiliacs who had contracted HIV, the Release expanded the class of individuals covered to include individuals who had contracted any infectious disease as a result of infusing Factor VIII products;

B) While the original notice stated that one member of a "Claimant Group" – defined as all relatives or other individuals who had derivative damage claims arising out of the infection of a hemophiliac – could accept on behalf of the entire claimant group, and thus receive payment without consultation with other members of the Claimant Group, the final release states that all members of a Claimant Group must sign the Release before any member thereof may receive payment;

C) Although the original $100,000 promised to each claimant was "net of attorneys fees," and thus placed the burden on the defendants to satisfy the attorneys fees owed by individual claimants, the Release states that each claimant is responsible for his or her own attorneys fees and costs;

D) While the original notice shifted the burden of satisfying medical or other liens which

> third parties might have against the claimants' $100,000 settlement, the Release states that the claimant now bears the burden of satisfying any liens not previously settled by the defendants.

20.

Said "release form" includes language to the effect that:

> Releasors further represent and warrant that in agreeing to the terms of this Release, they have not relied on any finding of the fairness of the terms of the Agreement and/or this Release by any Court, including any determinations made by the Court in the *Walker v. Bayer Corp., et al.* action in the United States District Court for the Northern District of Illinois or in the MDL proceedings pending in that same court. Rather, Releasors have reached their own decisions as to the fairness of the Agreement and this Release in consultation with counsel of their choice or have voluntarily elected not to consult with such counsel. Releasors also represent and warrant that they are not relying on the Court's order barring the filing or pursuit of individual claims and they would agree to the terms of the Release even if the Agreement were not part of a class settlement *but rather a completely private settlement.*

(Emphasis added).

21.

Defendants demanded that each claimant sign the release form before said claimants could receive the $100,000 promised to them in the settlement agreement.

22.

The aforementioned Release delineates the defendants' intention to treat the Settlement Agreement as compromising 6000 individual lawsuits, including 318 of the suits filed by Mull & Mull, and not as individual suits in a larger class actions. Such intention is specifically demonstrated by their representation to the members of the putative class, including Mull & Mull's clients, that said release indicates the full extent of information upon which the settling claimants should rely, totally independent of any actions or proceedings taking place in the case known as *Walker v. Bayer Corporation, et al.*

23.

Defendants have paid the $40,000,000 ostensibly designated as the Cost and Fee fund, as well as the underlying $600,000,000 to be used in satisfaction of the individual claimants' claims, in an interest bearing account, disbursements from which they and Special Settlement Counsel David Higgins continue to control. Defendants have thus retained constructive and actual possession of the funds which they previously agreed would be used in satisfaction of the 6000 opt-in claims.

24.

Consistent with this abrogation of the class settlement in favor of individual "private settlements" independent of any class settlements, Mull & Mull formally asserted as against the defendants their rights to be paid contingency fees consistent with the contracts its made with those individual claimants with whom the defendants have seen fit to settle individually. Specifically, Thomas W. Mull of Mull & Mull sent to the defendants – through their counsel of record – formal assertions of liens against the defendants individually, by letter of August 15, 1997.

25.

Undersigned counsel further notified the defendants on behalf of Mull & Mull, by letter of November 24, 1997, addressed individually to the president of each of the defendant corporations, of Mull & Mull's assertion of its attorneys' fee lien rights against the defendants individually, subjecting both the defendants and the $40 million Cost & Fee Fund they created to the lien.

26.

On December 3, 1997, Mull & Mull further recorded its contingency contracts with the appropriate clerks of court and has complied with all prerequisites to the creation of attorney liens.

27.

Mull & Mull now possess a valid and enforceable lien, and has placed defendants on actual notice of said lien, pursuant to the provisions of law governing the instant contracts.

28.

Although Mull & Mull represented each of its clients and thus any negotiations concerning the payment of the settlement funds should have been conducted through it, the defendants continued to ignore the Rules of Professional Conduct and communicated with the firm's clients in a direct attempt to lure them away from representation by the firm. Specifically, Marianna Harper – the mother of Scott Harper, a claimant in the MDL – called Special Settlement Counsel David Higgins to determine why her son's settlement check had not yet arrived. Higgins informed her that the defendants had instructed him that her check would be processed and her settlement paid only if she fired Mull & Mull as her attorney of record.

29.

Only after Ms. Harper phoned Judge Grady – the district judge in charge of the Factor VIII MDL – and complained of the defendants' outrageous and unethical conduct did the defendants retract their previous position and agree to pay her even if she did not discharge Mull & Mull.

30.

The above and foregoing conduct renders the defendants liable unto Mull & Mull and the Scott Harper in the following respects and for the following reasons:

A) By settling with the claimants directly and not communicating with them through Mull & Mull, their counsel of record, defendants have rendered themselves liable to Mull & Mull for payment of all attorneys fees and legal costs which the claimants have incurred as a result of their contracts with the law firm, pursuant to the applicable law governing attorney liens;

B) By communicating directly with Mull & Mull's clients, in violation of Louisiana and Model Professional Rule of Conduct 3.3, defendants have wantonly and intentionally interfered with the contractual relations between Mull & Mull and its clients;

C) By attempting to confect a settlement class, when the defendants knew or should have known that such a class was rendered null by *Windsor v. Amchem Prod.*, in that the class attempted to be settled had previously been rejected as a settlement class, the defendants have abused the judicial processes to the detriment of the plaintiffs;

D) By attempting to confect a settlement class, when the defendants knew or should have known that such a class was rendered null by *Windsor v. Amchem Prod.*, in that the class attempted to be settled had previously been rejected as a settlement class, the defendants have abused the rights granted to

them by the courts and by their status as litigants and administrators of a settlement fund;

E) By attempting to limit Mull & Mull's recovery of its attorneys fees to the $40 million Cost and Fee Fund, and attempting to compel the United States District Court for the Northern District of Illinois to abrogate Mull & Mull's contingency contracts in favor of a fee ceiling imposed by the division of the Cost and Fee Fund, defendants have interfered with the contractual relations of Mull & Mull with its clients;

F) Said conduct referred to in (E) has further caused the defendants to attempt to intentionally, deliberately and wantonly convert the full extent of the contingency fees to which Mull & Mull is entitled as a result of their contracts with their clients, and have made them liable unto Mull & Mull pursuant to Louisiana Civil Code Article 2315;

G) By holding Scott Harper's settlement hostage and contending that they would pay it when and if he fired his counsel fo [sic] record, the defendants maliciously and willfully interfered with his contractual relationship with his attorney, causing him severe mental distress and anguish over whether or not he could receive what was rightfully his.

30.

Said conduct further breaches the contract between the claimants and the defendants, in which the defendants agreed to pay each claimant $100,000 "net of attorneys fees," and which condition constitutes a material portion of the contract between the claimants and the defendants. Said contract created a *stipulation pour autrui* in favor of the attorneys representing the claimants, obligating the defendants to pay the attorneys the fees to which they and their clients had previously agreed. Those parties now appear herein as stipulator and beneficiary to assert the breach of the *stipulation pour autrui.*

31.

The defendants' conduct has caused Mull & Mull damages in the amount of their contracts with their clients and in the expense and effort it has taken to attempt to redress the defendants' attempts to limit the available recovery of fees to which it is entitled. Said damages include the costs and fees incurred during this litigation, as well as various economic damages which will be demonstrated at a trial of this cause.

32.

Defendants' heinous and outrageous conduct has caused Scott Harper severe mental and physical anguish and distress, humiliation and embarrassment at the thought of losing his settlement check because he picked a lawyer the defendants did not like.

WHEREFORE, Plaintiffs respectfully pray:

I. That the Court order service of this Complaint to be had on the defendants, through their registered agent for service of process in the State of Louisiana, and that;

II. After due proceedings are had, this Court issue an order declaring Mull & Mull to have a perfected and enforceable lien against the defendants in the amount of its contingency contracts, and that;

III. The Court further cast the defendants in judgment, jointly, severally and *in solido,* to pay all fees set forth in Mull & Mull's contingency contracts with those clients who have accepted the defendants' individual settlement offers, and that;

IV. The Court cast the defendants in judgment, jointly, severally and *in solido,* to pay Mull & Mull damages for the intentional and wanton interference which the defendants have committed in the contractual relations between Mull & Mull and those claimants it represented, and for the conversion of the contingency fee to which Mull & Mull is entitled as a result of its contracts, and for any and all other acts of negligence and/or intentional harm which the defendants have inflicted on Mull & Mull and Scott Harper, and that;

VI. The Court further award the plaintiffs any and all attorneys fees, punitive damages, and any and all other relief and award

against the defendants, consistent with justice and equity.

Respectfully submitted,

/s/ Robert E. Arceneaux
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Attorneys for Plaintiffs

PLEASE SERVE all defendants,
through their agent for service of process:

C.T. Systems, United Plaza Blvd, Baton Rouge, LA

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

IN RE FACTOR VIII OR IX CONCENTRATE BLOOD PRODUCTS LITIGATION	)	JUDGE JOHN F. GRADY
SUSAN WALKER, Administratrix of the Estate of Steven Walker, deceased, Plaintiffs, v. BAYER CORPORATION, et. al. Defendants	)	MDL-986 No. 96-C-5024

ORDER

IT IS HEREBY ORDERED that Spece And Ibáñez's Expedited Motion for Correction And Modification of Record On Appeal is hereby granted, and further;

THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS IS HEREBY INSTRUCTED to enlarge the record to be transmitted to the United States Court of Appeals for the Seventh Circuit so as to include the items designated as follows:

(1) May 15, 1997, Order of Honorable John F. Grady.

(2) October 22, 1997, Memorandum of Points And Authorities In Support Of Response To Motion For

Enforcement Of Order; Counter Motion For Orders Setting Expedited Hearing, Requiring Payment Of Sanctions, Payment Of Settlement Monies, Payment Of Liens For All Claimants, Rescinding Clause Of Release Exonerating Governmental Bodies, And Taking Jurisdiction Of And Allowing Discovery On Plaintiffs' And Their Attorneys' Claims Of Fraud, Interference With Contract, Unjust Enrichment, And Breach of Contract.

(3) October 24, 1997, letter of Roy G. Spece, Jr., to Honorable John F. Grady.

(4) November 19, 1997, Reply To Fractionators' And MDL Lead Counsel's Response To Counter Motion For Orders Setting Expedited Hearing, Requiring Payment Of Sanctions, Rescinding Clause Of Releases Exonerating Government Bodies, And Taking Jurisdiction Of And Allowing Discovery On Plaintiffs' And Their Attorneys' Claims Of Fraud, Interference With Contract, Unjust Enrichment, And Breach Of Contract.

(5) January 8, 1998, Motion For Expedited Reconsideration Of Ruling That Clients Of Rose Marie Ibáñez and Roy G. Spece, Jr. Need Not Be Paid Settlement Monies Unless The Latter Promise Not To Argue To This Court – Or To Another Court Only If This Court Does Not Wish To Exercise Jurisdiction – That Defendants Might Be Liable To Them On Theories Other Than, Or In Addition To, Rights Arising Out Of An Ostensible Class Settlement Involving An Attorney Cost And Fee Fund, The Amount Of Which Was Dictated By The Defendants.

(6) January 14, 1998, Objection To Proposed Form Of Order.

(7) Claim Forms To Request Fees And Costs filed By Rose Marie Ibáñez And Roy G. Spece, Jr.

Chicago, Illinois the 21 day of May, 1998.

/s/ John F. Grady
JUDGE JOHN F. GRADY

cjud

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge
John F. Grady

Sitting Judge if Other Than Assigned Judge

CASE NUMBER 96 C 5024 - (MDL 986)

DATE 5/26/1998

CASE TITLE SUSAN WALKER vs. BAYER

MOTION:

DOCKET ENTRY:

(1) ❑ Filed motion of [use listing in "Motion" box above.]

(2) ❑ Brief in support of motion due _____.

(3) ❑ Answer brief to motion due _____. Reply to answer brief due _____.

(4) ❑ Ruling/Hearing on _____set for _____ at _____.

(5) ❑ Status hearing [held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(6) ❑ Pretrial conference [held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(7) ❑ Trial [set for/re-set for] on _____ at _____.

(8) ❑ [Bench/Jury Trial] [Hearing] held/continued to _____ at _____.

(9) ❑ This case is dismissed [with/without] prejudice and without costs [by/agreement/pursuant to] ❑ FRCP4(m) ❑ General Rule 21 ❑ FRCP41(a)(1) ❑ FRCP41(a)(2).

(10) ■ [Other docket entry] Defendant's Motion to Modify Order of May 21, 1998 [ ] is allowed. The order entered on May 21, 1998 giving appellants' Spece and Ibanez leave to supplement the appellate record is hereby vacated and, in lieu thereof, the court now enters the alternative order submitted by the defendants, which grants Spece and Ibanez leave to expand the appellate record but does not include their claims for fees (item 7 of the May 21, 1998 order) which should not be part of the appellate record.

/s/ John F. Grady

* * *

✓ Notice faxed by judge's staff.

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

IN RE: FACTOR VIII AND FACTOR IX CONCENTRATE LITIGATION	: MDL No. 986
JONATHAN WADLEIGH and JOANNE WADLEIGH, h/w, et al.,	
Plaintiffs,	
v.	: THIS DOCUMENT : RELATES TO:
RHONE-POULENC RORER, INC.; ARMOUR PHARMACEUTICAL COMPANY, INC.; MILES INC.; BAXTER HEALTHCARE CORP.; ALPHA THERAPEUTIC CORPORATION; and NATIONAL HEMOPHILIA FOUNDATION,	: Case No. 93-C-5969 : Judge John F. Grady
Defendants.	

FRACTIONATOR DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs' Complaint and Motion for Class Certification fails to establish the prerequisites for class certification. The profusion of complex individual legal and factual issues to be resolved in each individual plaintiff's

claim as against any defendant clearly precludes certification. As this Court has noted in a similar context, "significant questions . . . of liability and defenses to liability will arise affecting only individual members of the [proposed] class in different ways." *Mink v. University of Chicago*, 27 Fed. R. Serv. 2d 739, 743 (N.D. Ill. 1979). Plaintiffs cannot meet their Rule 23(b)(3) burden of demonstrating that questions of law or fact common to members of the class *predominate* over questions relating solely to individual class members. Indeed, rather than providing for the efficient disposition of uniform claims, plaintiffs' proposed action would create a nightmare of individual minitrials involving myriad factual issues determined under the different substantive laws of fifty states. Such an action would be so unwieldy, confusing and inefficient that it could not provide adequate representation of the alleged thousands of class members by the individual plaintiffs, would prejudice the interests of the defendants, and would impose a tremendous burden on this Court's resources.

For a class action to be certified, Rule 23(b)(3) requires that common questions of law or fact predominate. Since plaintiffs have chosen to plead a nationwide class, the numerous permutations of the substantive law of all fifty states for each of plaintiffs' causes of action will cause individual questions of law to predominate over any common legal question. Even a partial overview of the legal issues involved in plaintiffs' claims reveals a profusion of differences between the states, making plaintiffs' proposed class both legally and practically untenable. Similarly, individual issues of fact, both as to liability and causation, will predominate.

A. Individual Issues of Law Predominate.

It is clear that there will be widespread diversity among members of the proposed class as to the legal standards that will be applied to establish liability or defenses. The Due Process Clause of the United States Constitution requires that for a forum state's substantive law to apply to a class member's claim, that state must have "significant contact or [a] significant aggregation of contacts" with the claim asserted by each class member. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985) (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981)). Moreover, in a nationwide class action, the forum state may apply its own law only after finding no material conflicts between its law and the law of other states. *Id.* at 818.

Plaintiffs make no contention that the purported class members who are not Illinois residents have any significant contact with the State of Illinois, or that there is no conflict among the various states' laws. Thus, the differing law of each of the 50 states would apply to the claims of the various class members.[1] *See Shutts*, 472 U.S. at 822. A separate analysis of the law for each of the fifty states (and the District of Columbia) would have to be conducted to determine the applicable law on at least the following issues: (1) the statute of limitations; (2) the negligence standard of care; (3) application of strict liability; (4) application of warranty theories; (5) the learned

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[1] As this Court observed in connection with a discussion of *Shutts* during the *Poole* trial, "if that is the law, then there can't be a class action." Tr. 31 (Appendix B).

intermediary doctrine; (6) third-party claims, contribution and indemnification; (7) contributory and comparative negligence; (8) assumption of the risk; (9) the recoverable elements of damages; (10) statutory caps on damages; and (11) availability of punitive damages. *See Abbent v. Eastman Kodak Co.*, No. 90-3436, slip op. at 13 (D.N.J. Aug. 28, 1992) (Appendix C).

Different common law requirements for proof of causation present even more problematic legal issues. For example, class members from Hawaii would presumably be entitled to proceed under a market share theory. *Smith v. Cutter Biological, Inc.*, 823 P.2d 717, 728 (Haw. 1991). Other states, however, have flatly rejected that doctrine. *E.g. Mowrer v. Armour Pharmaceutical Co.*, No. 92-6905, 1993 WL 542541 at *2 (E.D. Pa. Dec. 30, 1993) (Appendix D); *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 251, 560 N.E.2d 324, 337 (1990). Still others have never addressed the question or, if they have, have done so only in the unique context of DES, a generic drug which carried the identical risk of harm to each recipient. In Florida, the federal courts have split on the question of whether the market share theory embraced by Florida in DES cases extends to factor concentrates.[2] *Compare Kellar v. Cutter Labs.*, No.

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[2] Because a federal court sitting in diversity must apply the applicable law of the state as it exists (*Tidler v. Eli Lilly & Co.*, 851 F.2d 418 (D.C. Cir. 1988)), resolution of these issues relating to novel theories of recovery has prompted certification of questions to individual State Supreme Courts. Recently, for example, questions relating to the Idaho Blood Shield Statute and the availability of non-causation theories of recovery were certified by the federal court in Idaho to the Idaho Supreme Court in *Doe v. Cutter Biological*, No. 92-0434-S-HLR (copy

88-14059, slip op. at 8-11 (S.D. Fla. Feb. 24, 1992) (Appendix F), *summary judgment vacated on other grounds* (S.D. Fla. Sept. 1, 1992), *with Ray v. Cutter Labs.*, 754 F. Supp. 193, 196 (M.D. Fla. 1991) (Appendix G).

Similar questions will arise as to the application of such concepts as "alternative" liability or other "non-causation" theories. For example, in the *Poole* action this Court, applying Illinois law, found "alternative liability" applicable. Almost simultaneously, a federal court in Pennsylvania rejected application of the doctrine. *Mowrer*, 1993 WL 542541 at *3. Under the requirements of *Shutts*, a trial of claims coming from all fifty states and the District of Columbia would be dominated by this multitude of individual legal issues. It would be unrealistic to expect any judge or jury in a single class action trial to be able to apply these almost infinite permutations and combinations of the state law requirements applicable to each class member and defendant. The jury instructions alone, even if they could be formulated, would rival a torts treatise for length and complexity.

B. Individual Issues of Fact Predominate.

Plaintiffs have also failed to meet their burden of proof under Rule 23(a). Factual issues unique to each class member and that person's relationship with any defendant sought to be held liable are numerous, are in dispute, and clearly predominate. The factual basis for any possible liability for the HIV infection of any given

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attached as Appendix E). A motion to transfer that case is pending before the MDL Panel.

hemophiliac will depend on that hemophiliac's *totally unique* medical history, including such variables as: (1) the type of hemophilia he had; (2) how frequently and severely his hemophilia affected him; (3) when and how he was treated (including, at various different times, the general circumstances of his treatment and the level of knowledge of his physicians); (4) with which defendants' factor concentrates (if any) he was treated – and by which he allegedly was infected; and (5) when he was infected. Many hemophiliacs also have risk factors for AIDS other than their use of factor concentrates; as of last summer nearly one-third of adults with hemophilia and AIDS had such multiple risk factors (see pp. 11-16 below). Proof of these essential facts, as to any one hemophiliac, will prove *nothing* regarding those same questions as to any other hemophiliac. The allegations as to the named plaintiffs likewise do not support plaintiffs' contention that those claims are "typical" of the members of the proposed class or demonstrate that the named plaintiffs can provide adequate representation. Liability issues, as discussed below, likewise involve predominantly individual questions. In summary, there is no viable method by which such claims under these differing facts and states' laws could be tried to a jury in the context of a Rule 23 class.[3]

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[3] While some *discovery* issues may be common, the current MDL proceeding in this Court provides a method for realizing whatever economies may be achieved. *See In re Air Crash Disaster at Sioux City, Iowa on July 19, 1989*, MDL No. 817, 1990 WESTLAW 6891 at *2 (N.D. Ill. Jan. 9, 1990) ("Class certification would merely impose additional administrative burdens without any countervailing benefits.").

It is not surprising that for these very reasons class certification has been denied in every other such case alleging transmission of HIV by factor concentrates.[4] Plaintiffs' motion in this case should also be denied.

STATEMENT OF FACTS

Because this Court is familiar with the background facts relating to hemophilia, its treatment, the development of heat-treated concentrates, and the developing medical and scientific knowledge regarding HIV and AIDS during the relevant periods of time, defendants will not include here a comprehensive Statement of Facts but submit as Appendix A to this brief a Statement of Facts summarizing such information.

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[4] *See, e.g., Gannon v. Cutter Labs.*, No. C-85-20078 WAI, slip op. (N.D. Cal. April 11, 1988) (denying class certification of class of hemophiliacs alleging HIV transmission through AHF concentrates) (Appendix H); *Doe v. Cutter Biological*, No. 87-0232, slip op. (D. Haw. Dec. 8, 1987) (same) (Appendix I); *Doe v. Sno-Isle Community Blood Bank*, No. 86-2-16308-5, slip op. (Wash. Super. Ct. King Cty. June 26, 1987) (same) (Appendix J); *see also Ray v. American Nat'l Red Cross*, No. 90-7942 (D.C. Super. Ct. Feb. 11, 1992) (denying class certification of persons alleging HIV transmission through transfusions of Red Cross blood between June 11, 1984 and March 1985); *McBarnette v. Feldman*, 582 N.Y.S.2d 900, 153 Misc. 2d 627 (N.Y. Sup. Ct. 1992) (denying class certification of patients treated by dentist who died from AIDS). Very recently, on February 18, 1994, an Ontario Canada court denied class certification in a similar action against the Canadian Red Cross. *Sutherland v. Canadian Red Cross Society, et al.*, No. 16523/93, Ontario Court (General Division), Feb. 18, 1994.

ARGUMENT

I. DIFFERING STATE LAWS APPLY AND PRECLUDE CLASS CERTIFICATION.

This case presents predominating individualized issues of law (in addition to the numerous individual issues of fact described below). It is unavoidable that, in a nationwide class, the Court would have to resolve each of the individual factual issues under the laws of as many as fifty states. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985) (constitutional limits on choice of substantive law preclude application of the forum state's law to class action claims which occurred in multiple states). The state law basis for the claims in this action make class action treatment not only inappropriate but, as a practical matter, impossible. *Coe v. National Safety Assocs.*, 137 F.R.D. 252, 254 (N.D. Ill. 1991) (state law claims were "inappropriate for class treatment, since the proposed class consists of citizens of at least forty-eight states, and plaintiffs' claim necessarily includes claims which arose in each of those states.")

Forum law could not be applied to all claims here. In *Shutts*, the Supreme Court held that in a nationwide class action, a forum state may apply its own law *only* after finding no material conflicts between its law and the law of other states. 472 U.S. at 818. The forum state must also find that it has a " 'significant contact or significant aggregation of contacts' to the claims asserted by *each member* of the plaintiff class." *Id.* at 821 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981)) (emphasis added). In this case, most plaintiffs and class members have had no contact with Illinois. In addition, each count

of the complaint alleges claims based upon state law, which varies from state to state.

Plaintiffs cannot claim that there are no material conflicts of laws among all the relevant jurisdictions. Indeed, there is a bewildering variety of state law on the various claims asserted by plaintiffs, and there likewise are material conflicts regarding defenses raised by the various defendants. And although state tort law may be similar in some jurisdictions, even "widespread agreement" is not sufficient to warrant certification of a nationwide class. *Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258, 265 (S.D. Cal. 1988) (citing *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 165 (2d Cir. 1987), *cert. denied sub nom Pinkey v. Dow Chem. Co.*, 484 U.S. 1004 (1988)); *see also Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1016 (D.C Cir. 1986) ("Appellees see the 'which law' matter as academic. They say no variations in state warranty laws relevant to this case exist. A court cannot accept such an assertion 'on faith.' Appellees, as class action proponents, must show that it is accurate."), *cert. denied*, 482 U.S. 915 (1987).[5]

Even ostensibly discrete and limited issues, such as whether one or more of the defendants was negligent in its donor screening at a particular point in time, cannot be resolved for a class in a single proceeding because

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[5] Further, an individual analysis of each state's law will be required to determine necessary and indispensable parties to each of plaintiffs' theories of recovery, including, for example, whether the parties sued by certain of the named plaintiffs in their separately pending cases but not sued here are necessary parties under the applicable state's law. *See infra* note 9.

different states' laws impose different standards. California, for example, requires fulfillment of a professional standard of care. *Osborn v. Irwin Memorial Blood Bank*, 5 Cal. App. 4th 234, 271, 7 Cal. Rptr. 2d 101, 120-21 (Ct. App. 1992). Other states impose a "reasonable man" standard of care.

Because of the obvious problems involved, claims based upon state tort law generally are considered inappropriate for nationwide class-action treatment. *Coe*, 137 F.R.D. at 254; *see also Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1389 (7th Cir. 1990), (noting that dealing with multiple states' blue sky laws, especially in class actions, is a "nightmare"), *cert. denied*, 111 S. Ct. 2887 (1991); *Mink v. University of Chicago*, 27 Fed. R. Serv. 2d 739, 741 (N.D. Ill. 1979) (class actions are inappropriate in mass tort cases) (citing Fed. R. Civ. P. 23, Advisory Committee Official Comments). Class action certification is not proper in this case where numerous, differing state laws must be applied to numerous, individual claims.

II. QUESTIONS UNIQUE TO EACH PROPOSED CLASS MEMBER PRECLUDE THE NAMED PLAINTIFFS FROM SATISFYING THE REQUIREMENTS OF COMMONALITY, PREDOMINANCE, TYPICALITY, AND SUPERIORITY.

As every court deciding the issue has ruled, the highly individualized nature of AIDS/hemophilia litigation precludes representative plaintiffs from satisfying the remaining requirements of Rule 23. *See supra* note 4. "Failure to meet any of the requirements of Rule 23

precludes certification of a class." *Harriston v. Chicago Tribune Co.*, 992 F.2d 697, 703 (7th Cir. 1993).

In this case, plaintiffs cannot satisfy the remaining requirements of a Rule 23 class. In cases like this, where almost every facet of the litigation turns on facts and circumstances peculiar to each potential class member, the considerations relevant to typicality, commonality, and predominance tend to merge. *See General Tel. Co. v. Falcon*, 457 U.S. 147, 158 n.13 (1982). They are, therefore, discussed collectively below.

A. **Questions Relating to Causation Are Unique to Each and Every Class Member.**

As plaintiffs' Lead Counsel in MDL-986 has written, the initial focus in AIDS/hemophilia cases is on causation. *See* David S. Schrager and Wayne R. Spivey, *Representing the "Innocent" Victims of HIV*, National College of Advocacy, Washington, D.C., October 16-18, 1991 [hereinafter Schrager & Spivey]. Causation involves numerous individualized and case-specific facts as to each plaintiff and each potential class member.

Each class member must first establish that he used the concentrate of the fractionator(s) against whom he seeks to recover and became infected with HIV through the use of such concentrate. Obviously, HIV can be transmitted in a number of ways other than the use of antihemophilic factor concentrates. Indeed, many hemophiliacs used blood products other than factor concentrates. According to recent data from the CDC, more than 31% of adult and adolescent hemophiliacs with AIDS were exposed to sources of HIV in addition to

factor concentrates. *See* July 1993 CDC *HIV/AIDS Surveillance Report* at 14, Table 12 ("Adult/Adolescent AIDS Cases by Single and Multiple Exposure Categories, reported through June 1993, United States") (attached as Exhibit 11 to Appendix A). Thus, whether a particular hemophiliac used other blood derivatives, or engaged in other conduct that presented a risk of HIV infection, is a factual question that can be resolved only on an individual basis.

In addition, treatment alternatives vary from patient to patient, depending on the severity of his hemophilia. Although severe hemophilia is and has been almost universally treated with blood factor concentrates since they became available, milder degrees of hemophilia A can be treated with other blood derivatives, such as cryoprecipitate. However, most severe hemophiliacs also have been treated with blood derivatives other than factor concentrates, including blood transfusions, cryoprecipitate, fresh frozen plasma, and packed red blood cells, all of which are potential modes of HIV transmission. Detailed proof regarding the individual medical history of each hemophiliac, therefore, is essential to establishing – or rebutting – causation in each case. Any finding that a fractionator's concentrate caused one hemophiliac's HIV infection would have no bearing on whether that fractionator (or any other fractionator) may have caused any other hemophiliac's HIV infection.

The degree of knowledge of a hemophiliac's treating physicians also bears on the issue of causation in each case. Blood factor concentrates are available only upon the prescription of a licensed physician. A pharmaceutical company's failure to warn (asserted in Count I of the

Complaint) cannot be the proximate cause of the injury if the prescribing physician was aware of and considered the risks associated with the use of blood factor concentrates in reaching a prescribing decision. Since these facts – what each plaintiff's treaters knew about AIDS transmission, and when – will typically be different, proof of causation cannot be determined *en masse*. The claims of thousands of alleged class members, and therefore the state of knowledge of each of their numerous treaters over their treatment histories, is an absolute obstacle to any common determination of each class member's cause of action.

Plaintiffs assert that this class would include individuals with both direct and derivative claims. Thus, there would be additional individual issues for each hemophiliac's parents, spouses, children and guardians. For example, named plaintiff Susan Collins alleges that she was infected as a result of intimate contact with her hemophiliac husband, presenting issues unique to her claim. Complaint ¶ 6. Clearly, the circumstances surrounding such alleged transmission, including knowledge of the hemophiliac's HIV status, discussions with treating physicians concerning potential transmission of HIV to a spouse, the precautions taken when engaging in intimate contact, and the spouse's other risk factors, would vary dramatically for each individual. Proof of all of these facts is entirely dependent on individual circumstances relating to each class member, for which any form of class resolution would be impossible.

Defendants submit that individual questions relating to causation, in and of themselves, require rejection of the

requested certification of a class. *See Doe v. Sno-Isle Community Blood Bank*, No. 86-2-16308-5, slip op. (Wash. Super. Ct. June 26, 1987) (Appendix J); *Doe v. Cutter Biological*, No. 87-0232, slip op. (D. Haw. Dec. 8, 1987) (Appendix I). In *Sno-Isle*, the court found that the following items requiring individual proof precluded certification:

> The fact that individual damages must be proven for each class member will not defeat class certification. In this case, however, each class member would need to prove in an individual trial at least the following:
>
> (a) what product he took and when;
>
> (b) what warnings he received;
>
> (c) what the state of medical and scientific knowledge was at the time;
>
> (d) whether he was made seropositive by the use of product or by another product, such as cryoprecipitate;
>
> (e) whether other parties failed to pass on warnings to him; and
>
> (f) the nature and extent of his individual damages.
>
> Most significantly, proof of each defendant's breach of duty, proximate causation and whether the concentrate was unavoidably unsafe at the time it was used would have to be tried separately for each member. Because of this, there would be no common nucleus of operative facts which could be resolved in a general trial applicable to everyone.

Slip Op. at 6-7 (holding that commonality, typicality, and adequacy requirements had not been met). Similarly, in *Doe v. Cutter Biological* the court recognized that:

> Any plaintiff in this litigation will have to establish, *inter alia*, what coagulation factor materials he took and when; what warnings his prescribing physician received or did not receive, and when; what information was available to plaintiff, and when; the state of the medical and scientific knowledge at those times pertinent to his claim; that the AHF factor concentrate he took was factually the cause of his injury; that the producer of that concentrate was negligent in one or more of the ways alleged; and that such negligence was the proximate cause of the particular plaintiff's injury. Proof of each defendant's breach of duty and whether that alleged breach proximately caused the injury claimed by a particular plaintiff would have to be tried separately for each plaintiff. These issues will have to be decided individually on a case-by-case basis.

Slip op. at 6. *See also Gannon v. Cutter Labs.*, slip op. at 8 (rejecting argument that class should be certified to consider "general causation" with respect to blood factor concentrates because "the determination of these issues will not determine whether the illness of any individual plaintiff was in fact caused by defendants' product") (Appendix H); *In re "Agent Orange" Prods. Liab. Litig.*, 818 F.2d at 165 (relevant issue is not whether Agent Orange has the capacity to cause harm "but whether it *did* cause harm and to whom. That determination is highly individualistic, and depends upon the characteristics of individual plaintiffs . . . and the nature of their exposure");

Mertens v. Abbott Labs., 99 F.R.D. 38, 41 (D.N.H. 1983) (finding that DES can cause injury would do nothing to advance the common cause of class members); *In re Tetracycline Cases*, 107 F.R.D. 719, 733 (W.D. Mo. 1985) (finding that whether tetracycline "can, in a general sense, cause tooth discoloration or damage" would not advance the case); *see also Spencer v. Central States Southeast & Southwest Areas Pension Fund*, 778 F. Supp. 985, 990-91 (N.D. Ill. 1991) (no typicality where class claims were based upon defendant's representations in 27 different union meetings and where reliance on representations would necessarily vary from individual to individual).[6] As the court noted in *McElhaney v. Eli Lilly & Co.*, 93 F.R.D. 875, 878-79 (D.S.D. 1982):

> To recover on her own claim, plaintiff must prove exposure to DES, identity of the manufacturer, fact of injury, its causation by DES, breach of duty or fault on the part of the manufacturer, and damages. Relevant issues are when the DES was taken by each mother of each plaintiff, the amounts of DES prescribed and taken, the duration of exposure, the stage in pregnancy when DES was taken, the adequacy of the warnings accompanying the various drugs of the various manufacturers, the specific warranty or representation made, and the reliance upon it.

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[6] *See also Morrissy v. Eli Lilly & Co.*, 76 Ill. App. 3d 753, 394 N.E.2d 1369 (1st Dist. 1979) (denying DES class certification because of predominance of individual issues as to prescriptions, dosages, time of ingestion, patient histories, and alternative environmental exposures to carcinogens); *Ryan v. Eli Lilly & Co.*, 84 F.R.D. 230, 233 (D.S.C. 1979) (finding no predominance in a DES case because of the existence of individual issues).

> Assuming plaintiff established each of the above elements with respect to her own claim, she would have proved nothing with regard to the claims of the other class members. A recovery by plaintiff would not entitle any other class member to a similar remedy, nor would it materially affect the merits of other members' claims.

The same is true here. Given the myriad factual differences among all putative class members regarding causation, class certification is not a viable option.

B. Questions Relating to Negligence Are Also Unique to the Claims of Each Individual Class Member.

Although these cases broadly involve a common topic – alleged transmission of HIV through blood factor concentrates – questions of negligence and liability are also highly individualized. Unlike "single-incident" mass tort cases involving nearly simultaneous injury to a group of people (such as an aircrash or hotel fire), these claims allege wrongful conduct by each of several defendants over many years and involve alleged injuries to different persons by different means and in different places at different times. Each fractionator has a distinct history regarding, among other things, AIDS-related research; licensing, marketing and labeling; plasma sources and screening; and viral inactivation procedures.

Moreover, antihemophilic factor concentrates are not fungible. As noted in Appendix A, each processor prepares its own concentrates according to its own proprietary processes. Each process was and is independently licensed by the FDA. Each process was developed and

implemented at different times. Each concentrate is produced from different pools of plasma, and the plasma collection procedures, locations, and donor pools were different for each fractionator. Even concentrates processed by the same fractionator at different times are not identical because different plasma collection and fractionation procedures were utilized over time and, of course, the plasma of different individual donors was utilized in processing different lots.[7]

Because of the differences between the blood derivatives at issue, the claims of each purported class member are governed by a standard of care which varies over time according to both the changes in the existing scientific knowledge and the specific derivative in question. Proof of liability in each separate case must focus on the state of medical and scientific knowledge at the time relevant to the hemophiliac's alleged HIV infection. That, in turn, will depend on the highly individualized proof of when particular hemophiliacs became infected.

Contrary to plaintiffs' apparent but notably unsupported suggestion, the fractionators could not have known of the possible cause of AIDS before it became known to the preeminent government and independent scientists conducting the research in this area. What a fractionator should have known and whether it should have taken additional steps to prevent the transmission of

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[7] Moreover, plaintiffs propose a class that would include users of two different concentrates. Factor VIII concentrates and Factor IX concentrates are not interchangeable. They are not processed by the same means or even by the same fractionators throughout the relevant time period.

HIV will also depend upon when the relevant concentrate was processed and used, which will necessarily be a separate factual determination in every case.

Every personal injury class action case cited by plaintiffs involved generic or identical products where the claim was that the product *itself* was inherently dangerous or posed the same risk of harm to the user. Unlike such "products" cases,[8] AIDS transmission is not an inherent property of plasma or factor concentrates. Rather, the claims of individual class members involve issues relating to particular lots that allegedly included the plasma of donors carrying HIV. Indeed, even receipt of factor concentrates which contain plasma from an HIV-positive donor do not necessarily cause the recipient to become infected. *See*, C.A. Ludlam et al., "Human T Lymphotropic Virus Type III (HTLV III) Infection in Seronegative Hemophiliacs After Transfusion of Factor VIII," *The Lancet* No. 8449, Aug. 3, 1985, Vol. II at 233-36. (Appendix K).

Moreover, courts have been reluctant to certify classes even in cases involving structurally or chemically identical products (such as the Dalkon Shield IUD or Hartz flea spray). *In re N.D. of California Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 854 (9th Cir. 1982) (despite common questions concerning the Dalkon Shield IUD, problems of commonality existed because of "different representations and warnings made to each woman,

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[8] Products liability theories, such as strict liability and breach of warranty claims, are unavailable under most of the applicable state blood shield statutes as is discussed in the defendants' respective motions to dismiss.

different injuries suffered, and different defenses available to [the defendant]"), *cert. denied sub nom A.H. Robins Co. v. Abed*, 459 U.S. 1171 (1983); *Ikonen*, 122 F.R.D. at 262 (despite common issues concerning manufacture of flea spray, "the individual case histories of the pets of each class member will all involve different negligence, strict products liability, breach of warranty, fraud, and adequacy of warning issues"); *Rosenfeld v. A.H. Robins Co.*, 63 A.D.2d 11, 16-17, 407 N.Y.S.2d 196, 199 (N.Y. App. Div.) (despite common issues relating to defectiveness of Dalkon Shield, individual proof required as to liability), *appeal dismissed*, 46 N.Y.2d 731, 385 N.E.2d 1301 (1978).

In fact, the alleged "common questions" set forth by plaintiffs as the basis of their certification request merely restate plaintiffs' theories of liability (*see e.g.*, Complaint ¶ 27(a), (b), (c), (d), (e), (f), (h)), the answers to which will be different for each plaintiff and each class member depending upon the applicable law and the unique facts of each claim. For example, whether the defendants adequately warned a hemophiliac's treating physician about the risks associated with the use of concentrate depends upon the state of medical and scientific knowledge at the time the concentrate was processed and distributed. Whether an allegedly inadequate warning was the proximate cause of an injury depends upon the level of knowledge of that physician, which will necessarily be different for each plaintiff and class member. Similarly, whether a fractionator acted reasonably with respect to the processing and distribution of its concentrate depends upon the state of knowledge at the time of processing of each particular lot of concentrate that a particular plaintiff or class member claims was contaminated with HIV. *See*

Ryan v. Eli Lilly & Co., 84 F.R.D. 230, 233 (D.S.C. 1979). Put simply, a finding of liability in one set of circumstances cannot establish liability in any other. Certification would do nothing to advance the cause of the individual plaintiffs or the proposed class members.

C. Damages Differ Dramatically for Each Class Member.

While causation and negligence issues involving each class member are all highly differentiated, damage questions are even more fact-specific. Plaintiffs try to lump all of the potential class members together under the heading "AIDS," suggesting that everyone with HIV suffers the same symptoms, or that all proposed class members otherwise are similarly situated. Such is clearly not the case. AIDS is a syndrome that results in the suppression of an individual's immune system. Some persons may be entirely asymptomatic for many years. Moreover, an individual wit HIV infection can develop a variety of medical ailments which are anatomically diverse, may involve a wide range of possible impairment, and receive different treatment and different symptomatic relief. In addition, each individual hemophiliac's family relationships and employment history may be affected by both his hemophilia and his HIV infection, and those issues can be resolved only on a case-specific basis.

Moreover, many putative class members – relatives and legal representative of hemophiliacs – do not have and will not develop AIDS. Instead, their damage claims are based upon their legal relationship to an infected or deceased hemophiliac. Although most of these are based

upon loss of consortium, which itself is highly fact-specific, many assert claims in their own right for, among other things, emotional distress and fear of contracting HIV. The nature and amount of claimed damages will obviously vary greatly from individual to individual. And, once again, determining the amount of damages for one individual would do nothing to resolve that question as to any other class member.

Plaintiffs have gone so far as to attempt to turn the issues of damages into one of their supposed "common questions" allegedly uniting the class:

> Whether plaintiffs and the member of the class have sustained injuries and damages and, if so, what the proper mechanism is for assessing and awarding damages and administering other relief, including relief to reduce the threat of future harm[.]

Complaint ¶ 27(g). But to combine a myriad of individual questions into one conclusory statement does not demonstrate commonality. A determination that a plaintiff has been injured (normally not a contested issue as to an HIV-infected hemophiliac) would do nothing to further the action as to other plaintiffs. The real question in each case, if causation and negligence can be established, is the *amount* of damages. As has been readily acknowledged since the birth of the class action device, this is not a "common" question at all; the amount of damages for each plaintiff and each proposed class member will vary distinctly from person to person, depending upon their individual circumstances and the state law that will govern their claims. The "proper mechanism . . . for assessing

and awarding damages" for each individual claim is thus individual treatment, not certification of a class action.

D. Questions Differ Between the Fractionator and Non-Fractionator Defendants.

Another confounding problem is that one of the defendants has never processed or distributed blood factor concentrates. Defendant National Hemophilia Foundation ("NHF") is not a pharmaceutical company; it is a not-for-profit association including individual hemophiliacs, hemophilia treaters, and others, none of whom are currently defendants in this action. Plaintiffs' claims against the NHF are radically different from those brought against the fractionators: They assert breach of a voluntarily assumed duty to provide advice, information, and medical recommendations *to its members* (Count IV).

Several local hemophilia organizations, none of whom are defendants in this action, are not affiliated with the NHF. For example, in New Jersey (the home of Plaintiff Martha Dougherty) the local hemophilia organization is neither related to nor affiliated with the NHF. Ms. Dougherty cannot have claims against the NHF under Count IV if she never was a member or received its "advice." Membership in the NHF, receipt or NHF materials, and reliance thereon, would have to be addressed as to each supposed class member.

III. NAMED PLAINTIFFS CANNOT SATISFY THE REMAINING REQUIREMENTS OF RULE 23.

Even if named plaintiffs could satisfy the Rule 23(b) requirements, they still bear the burden of satisfying the numerosity and adequacy requirements of Rule 23(a). *See Trotter v. Klincar*, 748 F.2d 1177, 1184 (7th Cir. 1984) (plaintiffs bear the burden of proving each of the requirements of Rule 23). Because they cannot satisfy their burden, this case cannot be maintained as a class action. *See Doniger v. Pacific Northwest Bell Inc.*, 564 F.2d 1304, 1308-09 (9th Cir. 1977); *In re No. Dist. of California Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d at 855.

Rule 23(a)(1) permits certification of a class action only if "the class is so numerous that joinder of all members is impracticable." Although the most obvious facet of the numerosity analysis involves the size of the class itself, speculation about class size is not enough. *Marcial v. Coronet Ins. Co.*, 880 F.2d 954, 957 (7th Cir. 1989); 7A Wright, Miller & Kane, *Federal Practice and Procedure* § 1762 at 164 (1986). While plaintiffs speculate about the reasons more persons have not filed suit, the fact remains that only around 180 actions have been filed. This suggests that the majority of persons *who believe they have viable claims to assert* is much smaller than plaintiffs' speculation would suggest.

The numerosity requirement also involves a "subjective determination based on expediency and the inconvenience of trying individual suits." *Irving E. Schermer Trust v. Sun Equities Corp.*, 116 F.R.D. 332, 336 (D. Minn. 1987). Beyond mere numbers, a court should look at the type of action, the size of the individual claims, and the ability of

the proposed class members to maintain their own actions. *See In re Workers Compensation*, 130 F.R.D. 99, 104 (D. Minn. 1990); 1 Newberg & Conte, *Newberg on Class Actions* § 3.06, at 3-27 to 3-28 (3d ed. 1992); *see also Shutts*, 472 U.S. at 809 (class actions "permit the plaintiffs to pool claims which would be uneconomical to litigate individually"). Where the allegations include damages for serious injury and death, no such concerns exist as to the ability of the individuals to initiate lawsuits on a contingent fee basis. Many have done so (including plaintiffs separately represented by many of the lawyers now appearing as "class" counsel). Thus, regardless of how characterized, plaintiffs' purported class fails to satisfy the numerosity requirement of Rule 23(a).

Plaintiffs claim throughout their Memorandum that the confidentiality needs of the proposed class members, arising out of a "stigma" attached to HIV, are an additional basis for certification. *See, e.g.*, Plaintiffs' Memorandum at 2. However, the cease of identifying potential class members and determining their respective geographic locations, as well as the ease of effectuating notice and service upon them, are relevant to the numerosity analysis. *See Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 878 (11th Cir. 1986). Any desire for confidentiality on the part of the proposed class members thus weighs against certification, not in favor of it. Likewise, how can one "opt out" anonymously? Plaintiffs around the country who have desired to do so have filed their individual actions under pseudonyms. In fact, four of the nine "named" representative plaintiffs here who have separate lawsuits pending (Larry and Juanita Burr and Martha and Timothy Dougherty) have previously filed individual

actions using pseudonyms.[9] This has created no hindrance to the pursuit of their claims, and can be accommodated on an individual basis, but not in a class action.

With respect to the adequacy requirement, it is not enough that the plaintiffs may have retained qualified lawyers to handle their cases; the named plaintiffs must be able to adequately represent the proposed class. 7A Wright, Miller & Kane, *Federal Practice and Procedure*, § 1766 at 311 (1986). Contrary to plaintiffs' assertion at p. 12, n.3, "[t]he plaintiff [not the defendants,] carries the burden of showing that it will fairly and adequately represent the class." *First Interstate Bank of Nevada, N.A. v. Chapman & Cutler*, 837 F.2d 775, 781 (7th Cir. 1988).

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[9] Mr. and Mrs. Burr's action is pending in state court in Missouri under a pseudonym (No. 932-8155) and names as defendants Bi-State Hemophilia Association and the four fractionator-defendants here, but not the NHF. The Dougherty plaintiffs' action is pending under a different pseudonym in Middlesex County, New Jersey (No. L-8531-93) and names three medical providers and various "Doe" blood banks, clinics, hospitals, distributors and individuals, in addition to the four fractionators, but not the NHF. At least five other named plaintiffs have individual actions pending. Mr. Kuhn's separate individual action (No. H-93-3198 – consolidated) was transferred to this Court from the Southern District of Texas. It names the Institute of Hemotherapy in addition to the defendants here. Mr. Erickson also has an individual action pending in the Circuit Court of Cook County (No. 93 L 03704). It names Alpha, Baxter, Miles and Armour as defendants. Linda, Jerry L. and Jerry Grant Lewis have an action pending in state court in Texas (No. 9310438, Travis County, 250th Judicial District) against Austin Blood Components, Austin Plasma Co., Blood Components of San Antonio, Miles, Alpha, Baxter and Armour. The Lewis plaintiffs (but not the other plaintiffs in that case) have moved to dismiss their Texas claims.

In order to ensure adequate representation, first, "a named representative . . . must be injured in the same way as all members of the class." *Aleknagik Natives Ltd. v. Andrus*, 648 F.2d 496, 505 (9th Cir. 1980). Second, as plaintiffs admit, the representatives' interests cannot be antagonistic to those of other members of the proposed class. Neither of these elements has been established by plaintiffs here.[10] Plaintiffs have failed to provide any information, either in their complaint or motion papers, as to when or from what blood derivatives the named plaintiffs allegedly contracted AIDS. Plaintiffs supply no facts to address the question of whether any one plaintiff was injured in the same way as other class members.

Furthermore, the significant differences among hemophiliacs with respect to the severity of their condition, methods of treatment, and the time when they seroconverted create obvious conflicts within the proposed class. Plaintiffs who used only Factor VIII have no cognizable interest in attempting to make a case involving Factor IX. Plaintiffs who used the concentrate of one fractionator have no legal interest in pursuing a case against the others. Plaintiffs who seroconverted at one time cannot represent the interests of those who seroconverted at another time and whose actions involve a different standard of care or are barred by the applicable

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[10] Plaintiffs address this issue in one conclusory paragraph at page 12 of their brief which provides no information necessary to determination of the issue. Defendants respectfully submit that prior to any finding that the named plaintiffs would provide adequate representation, defendants should be permitted to take discovery directed to the issues relevant to adequacy.

statutes of limitations. Plaintiffs with no affiliation with the NHF have no arguable interest in pursuing a suit against the NHF.

The named plaintiffs have already demonstrated that they have no interest in protecting any rights which class members may have against persons and entities not named as defendants in this action. This decision was made despite the recognition by at least one of the plaintiffs' attorneys that such rights should be explored and pursued:

> It is . . . prudent to explore the medical basis or indications on which Factor VIII concentrated product was recommended for infusion in a particular patient. If the client is a severe hemophiliac, as stated previously, there were few or no options and Factor VIII therapy was the medical standard. However, if the client is a mild hemophiliac, a fair question is presented as to why the Factor VIII concentrate was infused, particularly if the infusion occurred during and after 1984 when it was widely known that the infusion of blood or blood products carried with it the risk – in part uncontrollable, of HIV exposure. That is obviously more of a medical malpractice issue than a product liability theory.

Schrager & Spivey, *supra.* Indeed, plaintiffs Martha and Timothy Dougherty's individual action in New Jersey *does* name health care providers – claims which have apparently been abandoned here.

In their ardor to make this lawsuit look more like a potential class action, plaintiffs' counsel have ignored many possible causes of class members' alleged injuries and other causes of action they may have for redress.

This underscores the individual nature of these cases and the inadequacy of plaintiffs' proposed representation.[11]

IV. CLASS CERTIFICATION IS NOT A SUPERIOR WAY OF RESOLVING THESE HIGHLY INDIVIDUALIZED CLAIMS.

A class action would not be a superior method to the already existing alternative: MDL coordinated discovery followed by individual trails. If a class were certified here, the present lawsuit would inevitably degenerate into an agglomeration of separate tort claims arising out of factual circumstances unique to each class member under the law of each jurisdiction. For this critical reason, courts have refused certification in every single AIDS/hemophilia class action ever filed. *See supra* note 4.

Faced with similar actions involving multiple personal injury claims, most courts recognize the impossibility of managing class trials of individual claims. *In re Tetracycline Cases*, 107 F.R.D. at 724, summarized the governing law:

> Whether class certification has been denied on the basis of lack of commonality, typicality, or

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[11] That some of the named plaintiffs have engaged in "media campaigns" in direct, extra-judicial efforts to communicate with putative class members in no way supports their claim to be adequate representatives; indeed, such an attempt to undermine these proceedings dictates the opposite conclusion. *See, e.g.*, articles attached as Appendix L. *See also Poole*, Tr. at 18. (The Court: "[R]emind me of this if the time should come, if I do certify a class in a class action, no class representative is going to be one of those professional media persons regardless of motivation.") (Appendix M).

> predominance and superiority, most courts have exhibited great reluctance to certify a class in actions involving a number of defendants and exposure to the product in question over an extended period of time. . . . Usually, these courts have concluded that the individual nature of the proof as to liability, individualized questions as to affirmative defenses, and the absence of a single event causing the injury result in such a multiplicity of issues as to make class action treatment inappropriate or unworkable.

Thus, in *Kanon v. Brookdale Hosp. Medical Ctr.*, 87 Misc. 2d 816, 386 N.Y.S.2d 274 (N.Y. Sup. Ct. 1975), a case involving premature infants born in one hospital over a period of years who claimed damages as a result of negligent treatment with oxygen before birth, the court stated:

> [T]his matter would be unmanageable as a class action. . . . There appears to be no manageable way of trying as a class action all the potential claims of the class arising in various jurisdictions, at different times, at a time when the status of medical knowledge is different, when the dissemination of medical knowledge is at best questionable, when defenses and legal applications vary from case to case, and where proximate cause and the existence of damage in each case is an individual variable.

386 N.Y.S.2d at 276. *See also, Yandle v. PPG Indus., Inc.*, 65 F.R.D. 566, 571 (E.D. Tex. 1974) (refusing to certify a class where "*uncommon* questions of law and fact would predominate over the common questions, and the case would therefore 'degenerate . . . into multiple lawsuits

separately tried' "; citing Rule 23, Notes of Advisory Committee).

In refusing to certify the plaintiff's product liability claims as a statewide (not nationwide) class on the issue of liability, the Ninth Circuit similarly stated:

> In products liability actions . . . individual issues may outnumber common issues. No single happening or accident occurs to cause similar types of physical harm or property damage. No one set of operative facts establishes liability. No single proximate cause applies equally to each potential class member and each defendant. Furthermore, the alleged tortfeasor's affirmative defenses (such as failure to follow directions, assumption of the risk, contributory negligence, and the statute of limitations) may depend on facts peculiar to each plaintiff's case.

Dalkon Shield, 693 F.2d at 853.

The alternative to a class action which already exists is far superior – an MDL capable of efficiently coordinating discovery in both federal and state cases, to be followed by individual trials of the plaintiff's unique claims in the transferor forum, presided over by a judge familiar with the particularized law of that state.

Contrary to plaintiffs' position, courts have not abandoned precedent, rejected the intent of the drafters of Rule 23, and ignored the management problems associated with certification in the personal injury context in favor of some "trend." Indeed, plaintiffs' cases actually support the general rule that personal injury actions are poor candidates for class treatment.

For example, in *In re "Agent Orange" Prods. Liab. Litig.*, the Second Circuit sharply criticized the use of class actions to determine "general" or "generic" causation issues in products liability cases, 818 F.2d at 164-65, upholding limited class certification only because of the potentially dispositive issue of whether the government's purchase and use of the product insulated the manufacturer from liability, *id.* at 166-67. Plaintiffs ignore that court's unequivocal statement that "[w]ere this an action by civilians based on exposure to dioxin in the course of civilian affairs, *we believe certification of a class action would have been error.*" 818 F.2d at 166 (emphasis added).

Plaintiffs' reliance on *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir.), *cert. denied sub nom., Anderson v. Aetna Casualty & Sur. Co.*, 493 U.S. 959 (1989), is equally misplaced. First, that action involved certification for settlement purposes, where "[t]he requirements for class certification are more readily satisfied . . . than when a class has been proposed for the actual conduct of the litigation." *White v. National Football League*, 822 F. Supp. 1389, 1402 (D. Minn. 1993). Moreover, the only issue for which class treatment was deemed appropriate was whether the defendant's insurance carrier could legally be held liable as a "joint tortfeasor" with A.H. Robins, not whether the product itself was responsible for the claimed injuries. *In re A.H. Robins Co.*, 880 F.2d at 747. The court observed that if the carrier were not found to be a joint tortfeasor, all of the class members' claims would fail. *Id.* at 741. Plaintiffs also fail to note that the carrier had agreed, if it were found to be responsible, "not . . . [to] litigate separately any of the non-common issues of individual medical causation and individual

amounts of damages" instead agreeing to provide class members with an abbreviated right to recovery through a "Claims Resolution Facility." *Id.* at 743.[12]

Contrary to plaintiff's suggestion, litigation involving blood factor concentrates poses no looming threat to the federal judiciary. Unlike the administrative morass created by asbestos litigation, which caused the 5th Circuit to approve class certification where over 20,000 actions had been filed, *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468 (5th Cir.), about 180 individual lawsuits concerning AIDS and hemophiliacs have been filed in various state and federal courts. This likely reflects the fact that the vast majority of those hemophiliacs who contracted HIV through the use of AHF concentrates are seroconverted by 1982, when neither the cause nor mode of AIDS transmission had yet been discovered. There is also no reason to expect a future explosion in litigation, because current processing techniques prevent HIV transmission. Thus, the certification of the class also raises the concern that it will encourage the filing of relatively weak or meritless claims which would dilute the claims of others. *See Ikonen*, 122 F.R.D. at 265.

Similarly, in another decision cited by plaintiffs, in certifying the class of residents surrounding a landfill which had allegedly contaminated the area's water supply, the court conceded that:

> In complex, mass, toxic tort accidents, where no one set of operative facts establishes liability, no

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[12] The court was also clearly concerned with the fact that there were over 300,000 claims for recovery. 880 F.2d at 741.

> single proximate cause equally applies to each potential class member and each defendant, and individual issues outnumber common issues, the district court should properly question the appropriateness of a class action for resolving the controversy.

Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1197 (6th Cir. 1988). Because blood factor litigation clearly involves all of these individual issues, plaintiffs' reliance upon *Sterling* is misguided. *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58 (S.D. Ohio 1991), is likewise distinguishable because no individual medical claims were asserted in that case. *Id.* at 65.

Plaintiffs' remaining citations to asbestos property damage cases are completely inapposite, because in each of those cases the court expressly noted that although certification posed significant management problems, the unusual nature of asbestos litigation heavily influenced their decisions. *In re School Asbestos Litig.*, 789 F.2d 996, 1011 (3d Cir.), *cert. denied sub nom. Celotex Corp. v. School Dist. of Lancaster*, 479 U.S. 852 (1986); *Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177, 182 (4th Cir. 1993). Thus, plaintiffs' own cases support the rule that class treatment is generally inappropriate in personal injury actions.

In addition to the overwhelming management problems typical of such actions, certification in this context raises sensitive concerns peculiar to the nature and public perception of HIV that cannot and should not be ignored. By seeking class certification plaintiffs are necessarily asking the Court to invade the personal lives of HIV-infected hemophiliacs and their families. They are asking

the Court to require all such persons to come forward and disclose their sexual histories and medical conditions, and whether or not they have AIDS. They are also asking this Court to force them to sue the companies that process the concentrates which are keeping many of them alive. This seems especially peculiar, given plaintiffs' professed concern with the privacy of others.

Whether to become a litigant in a major personal injury action is a significant personal decision which should be left to each individual to make, in consultation with his family, medical advisors and counsel. If he wants to sue, he has that remedy available and is free to name those defendants he has claims against and to sue in a court of his own choosing. Denying class certification here will impair none of his rights; granting certification will certainly do so. *See Mink*, 27 Fed. R. Serv. 2d at 743 n.6 (certification could bar the claims of some class members because of res judicata) (citing *Hansberry v. Lee*, 311 U.S. 32, 41 (1940), and *Cartolano v. Tyrrell*, 421 F. Supp. 526, 530 (N.D. Ill. 1976)).

Class certification here would also pose serious concerns for the hemophilia community. In addition to the privacy implications, certification may create an adversarial relationship between hemophiliacs and the health care professionals on whom they rely (all of whom will necessarily be drawn into the morass of discovery which certification would generate), and would create the need for individualized counsel and advice for each potential class member. There are many, many reasons not to certify this case as a class action, not the least of which are the needs and interests of the potential class members themselves.

CONCLUSION

As the cases discussed above all confirm, potentially serious personal injury claims arising in different places and at different times are particularly ill-suited for class action treatment. Plaintiffs propose that this Court embark on what one judge has called "a trial court's nightmare of a litigation monster." *Walsh v. Ford Motor Co.*, 130 F.R.D. 260, 277 (D.D.C. 1990), *appeal dismissed*, 945 F.2d 1188 (D.C. Cir. 1991). When the individual issues of law are compounded by the individual issues of fact, the conclusion is inescapable: The named plaintiffs *cannot* establish the prerequisites for class certification in this case, and their Motion for Class Certification should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sara J. Gourley, certify that I caused a copy of the foregoing Fractionator-Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification to be served by Federal Express upon all counsel on the attached service list outside of Chicago, Illinois, and by messenger to counsel in Chicago, Illinois, this 28th day of February, 1994.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MULL & MULL, PLC,
Petitioner,
v.
RHÔNE-POULENC RORER INC., *et al.*,
Respondents.

ROY G. SPECE, JR. and ROSE MARIE IBANEZ,
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v.
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On Petitions for Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTION PRESENTED

Whether certain plaintiffs' attorneys who supported a nationwide class settlement prior to the final district court judgment that approved the settlement, and who did not appeal that final judgment, may, on collateral attack, seek to have the settlement declared void so that they can evade the explicit provision of the settlement agreement governing attorneys' fees?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondents state the following:

The parent company of Rhône-Poulenc Rorer Inc. ("RPR Inc.") is Rhône-Poulenc S.A. All subsidiaries of RPR Inc. are wholly owned.

The parent company of Armour Pharmaceutical Company ("Armour") is Rhône-Poulenc Rorer International (Holdings) Inc. All subsidiaries of Armour are wholly owned.

The parent company of Bayer Corporation is Bayer A.G. Schein Pharmaceutical, Inc., Onyx Pharmaceuticals, Inc., Millenium Pharmaceuticals, Inc., and Myriad Genetics, Inc. are nonwholly-owned subsidiaries of Bayer Corporation.

Baxter Healthcare Corporation's ("Baxter Healthcare") parent company is Baxter International, Inc. Baxter owns stock in certain publicly-traded companies and is filing this information under seal with the Clerk of the Court.

The parent company of Alpha Therapeutic Corporation ("Alpha Therapeutic") is Green Cross International, Inc. Business Travel Specialists, Inc., G.C. Pharmaceutical (Singapore) Ptc Ltd., Grifols UK Ltd., and Grifols Italia, SpA, are nonwholly-owned subsidiaries of Alpha Therapeutic.

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RESPONDENTS' BRIEF IN OPPOSITION

To make the procedural posture of this case clear:

The petitions challenge a final class settlement that has already paid $596.7 million—free of most government, health insurer, and attorney claims—to 5,967 hemophiliacs who claim that they contracted HIV from the plasma

therapies used to treat their bleeding disorder, the families of these hemophiliacs, and their estates. Petitioners are *not* dissatisfied class members seeking to challenge that settlement. Rather, petitioners are a few dissident plaintiffs' attorneys who admit that they deliberately withheld their present objections to the class settlement until the judgment was final and respondent fractionators [1] were obligated to pay class members. Opp. App. 51a.[2] Petitioners then launched this collateral attack in order to evade a key provision of the settlement, which established a $40 million cost and fee fund to be the exclusive source of compensation for plaintiffs' attorneys.

Petitioners Mull & Mull, Roy Spece, and Rose Ibanez want this Court to declare void the final judgment that certified the settlement class and approved the settlement, so that they can seek, through satellite lawsuits filed in state court, attorneys' fees above and beyond those provided in the class settlement. To rationalize their attack on the class settlement, in which many of their own clients are participating, petitioners propose the fiction that fractionators made thousands of irrevocable individual settlement offers when, pursuant to the terms of the class settlement agreement, fractionators mailed release forms to class members.

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[1] "Fractionation" is the process by which blood plasma is separated into its derivatives. Fractionators are Armour Pharmaceutical Co., Bayer Corp., Baxter Healthcare Corp., and Alpha Therapeutic Corp. Also named as a defendant is Rhône-Poulenc Rorer Inc., the indirect parent corporation of Armour.

[2] To support their Counter Statement of the Case, which differs significantly from that presented by petitioners, fractionators have reproduced certain key materials in the appendix to this brief ("Opp. App.") and have lodged with the Clerk of the Court copies of fractionators' appendix to their brief in the court of appeals ("FA"), which reproduces additional settlement documents and excerpts from the record of this case.

Both the district court and the court of appeals rejected petitioners' contorted theories. Both courts held that the district court had jurisdiction to enter judgment approving the class settlement and declined to declare that final judgment void based on this Court's subsequent decision in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 117 S. Ct. 2231 (1997). And both courts arrived at the unremarkable conclusion that attorneys cannot pretend to support a final judgment that approves a class settlement and later attack that settlement in a bid for higher fees.

There is nothing about those holdings that is remotely worthy of review. No decision of this or any other court has allowed attorneys to engage in the cynical procedural gamemanship being pursued by petitioners. Nothing in the Article III or Rule 23 decisions upon which petitioners rely supports their attack on a final judgment that is benefiting thousands of persons. And, as demonstrated below, nothing in the record of this case points to any gross impropriety in the settlement warranting intervention by this Court to consider facts unique to this litigation.

COUNTER STATEMENT OF THE CASE

1. Hemophilia is an incurable bleeding disorder caused by deficiencies of certain clotting factors in the blood. It is treated by administering the missing clotting factors to the patient. In the late 1960s and early 1970s, fractionators developed freeze-dried clotting factor concentrates that resulted in "the return to a full range of activities for many patients who were previously wheelchair-bound" and, between 1968 and 1983, a doubling in the life expectancy of persons with hemophilia. FA 904.

The advent of the disease now known as AIDS had a tragic impact on persons with hemophilia. The first cases

of the disease were reported in June and July of 1981 in homosexual men. FA 897, 899. A year later, AIDS-like symptoms were first reported in three persons with one form of hemophilia. FA 902. But it was not until 1984 that: (a) the medical community reached a consensus that AIDS was transmissible by blood; (b) scientists identified the retrovirus now called HIV and known to be the cause of AIDS; and (c) the Centers for Disease Control demonstrated that HIV was inactivated by heat-treatment processes that had recently been approved to inactivate hepatitis in certain factor concentrate. *In re Rhône-Poulenc Rorer Inc. ("RPR")*, 51 F.3d 1293, 1296 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995); FA 923. The following year, the first blood screening test to detect antibodies to HIV was licensed. *Kozup v. Georgetown Univ.*, 663 F. Supp. 1048, 1052 (D.D.C. 1987), *aff'd in part and vacated in part*, 851 F.2d 437 (D.C. Cir. 1988).

These discoveries came too late for many persons with hemophilia. About 50 percent of the hemophiliacs who used factor concentrates between 1978 and 1985 were infected with HIV, most before January 1983. FA 915. Thus, before anyone knew that AIDS was transmissible by blood and plasma products, thousands of people with hemophilia had already been infected. *See RPR*, 51 F.3d at 1296.

2. More than 350 lawsuits have been filed in state courts and approximately 230 have been filed in federal courts alleging HIV transmission through factor concentrate. In late 1993, all pending federal factor concentrate cases were consolidated in the Northern District of Illinois before Judge John F. Grady. *In re Factor VIII & IX Concentrate Blood Products Prod. Liab. Litig. (MDL-986)*, 853 F. Supp. 454, 456 (J.P.M.L. 1993). Thomas Mull—a name partner in petitioner Mull & Mull—was

among the attorneys named to Plaintiffs' Steering Committee ("PSC"). FA 210-18.

In late 1994, the district court certified a nationwide "issue" class for the purpose of determining whether the fractionators were "guilty of ordinary negligence." *Wadleigh v. Rhône-Poulenc Rorer,* 157 F.R.D. 410, 426 (N.D. Ill. 1994). The United States Court of Appeals for the Seventh Circuit subsequently issued a writ of mandamus ordering the district court to decertify the class for three reasons: 1) the class trial on the issue of negligence would irreparably injure fractionators by placing upon them unfair pressure to settle; 2) the district court's plan to give the jury "a kind of Esperanto instruction" did not reflect the nuances in the negligence law of any jurisdiction; and 3) the bifurcated trial procedure proposed by the district court would violate the Seventh Amendment because issues that would be determined in the negligence "issue" trial overlapped wtih issues that would be determined by different juries in the subsequent individual trials. *RPR,* 51 F.3d at 1299, 1303. This Court denied PSC's petition for certiorari, 516 U.S. 867 (1995), and the *RPR* class was decertified. FA 338.

3. On April 19, 1996, fractionators proposed a settlement that would pay up to $100,000 for each HIV-positive hemophiliac who used factor concentrate and for certain persons allegedly infected with HIV through exposure to such hemophiliacs. The total value of this part of the April 1996 settlement proposal was limited to $600 million; if more than the anticipated 6,000 claims were filed, each claimant would be paid less than $100,000. FA 355, 416. Because certain plaintiffs had made settlement demands of $100,000 net of attorneys' fees, *see* FA 361, fractionators proposed the establishment of a separate $40 million fund from which the costs of implementing the settlement would be paid and from which the

district court would award reasonable costs and attorneys' fees to plaintiffs' attorneys. FA 355. PSC rejected fractionators' proposal. FA 353.

After several months of intense negotiations, fractionators and PSC agreed to the present class settlement, in which fractionators agreed to pay $100,000 for each claim, even if the number of claims exceeds 6,000. FA 8 § B; *see also* FA 354-55, 405. The settlement agreement expressly required claimants to execute releases in order to receive payment. FA 41 § M. Fractionators also undertook to pay additional monies to resolve federal and state Medicare and Medicaid claims as well as the claims of most private health insurers, so that claimants would receive the settlement payments free and clear of most outstanding claims. FA 46 § P(1). Finally, the settlement agreement stated that plaintiffs' attorneys would not be entitled to collect fees based upon a percentage of the settlement paid to class members and that the $40 million fund was the exclusive source for all costs and attorneys' fees, which would be awarded by the district court. FA 40-41 §§ L(2) & (5).

4. In August, 1996, PSC sought preliminary certification of a nationwide settlement class in the case of *Walker v. Bayer Corp.*, 96-C-5024 (N.D. Ill.). FA 394-97. Mull was listed as counsel on the *Walker* complaint. FA 393. He attended the hearing at which the district court gave its preliminary approval to the settlement and authorized the issuance of notice to the class. FA 399. Mull did not object to the proposed class settlement. FA 412-13, 429-38. Petitioner Ibanez filed a three-page brief in which she asserted that the $40 million cost and fee fund was insufficient in amount but expressly waived that objection on the understanding that (1) all costs would be paid and (2) "the probable burden of inadequate fees is spread evenly among all the attorneys . . . ." Opp. App. 99a.

Mull was among the plaintiffs' attorneys who moved for final approval of the class settlement. FA 455. After notice issued, the vast majority of persons in the hemophilia community who were entitled to file claims did so. FA 528-29.

On November 25, 1996, the district court held a day-long fairness hearing. Both Spece and Mull were present. FA 519. Neither objected to the class settlement. Mull's comments focused upon a settlement implementation issue —establishment of a trust mechanism so that receipt of the settlement money would not disqualify class members from government entitlements. FA 540-44, 563-68.

The district court did not rule immediately upon the fairness of the settlement because, *inter alia*, fractionators were still negotiating with the United States government, state governments, and dozens of insurers to compromise any claims against settlement monies that would be paid to class members. FA 573-82. Fractionators eventually paid more than $30 million to secure these compromises; each of the agreements with insurers and government entities refers specifically to the class settlement. *E.g.*, FA 156, 176, 194. Working with PSC and the hemophilia community, fractionators also secured the passage of legislation that endorsed the *Walker* class settlement by name and provided that receipt of the $100,000 settlement payment would not affect claimants' eligibility for medical assistance payments. *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4735, 111 Stat. 251, 522 (1997).[3]

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[3] Section 4735 provides:

(a) IN GENERAL.—Notwithstanding any other provision of law, the payments described in subsection (b) shall not be considered income or resources in determining eligibility for, or the amount

On May 6, 1997, a second fairness hearing was held. In correspondence prior to the hearing, Mull argued that class members should be given a new opportunity to opt out of the settlement based on purported newly discovered evidence, but he did not challenge certification of a settlement class or assert that the settlement was unfair. FA 640, 667. At the hearing, a Mull colleague made the same argument. FA 612. He also complained of alleged fraud on the part of fractionators and PSC. FA 634-35. However, Mull's colleague expressly stated that he was not asking the court to reject the settlement. FA 630, 685; Pet. App. 69-70. Robert Arceneaux, Mull's attorney, also appeared and stated that he did not object to certification of the settlement class or final approval of the class settlement. FA 677-80.

The district court concluded that Mull *et al.* had not identified any new evidence or colorable basis for their fraud allegations and refused to reopen the opt-out period.

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of benefits under, a State plan of medical assistance approved under title XIX of the Social Security Act.

(b) PAYMENTS DESCRIBED.—The payments described in this subsection are—

(1) payments made from any fund established pursuant to a class settlement in the case of Susan Walker v. Bayer Corporation, et al., 96-C-5024 (N.D. Ill.); and

(2) payments made pursuant to a release of all claims in a case—

(A) that is entered into in lieu of the class settlement referred to in paragraph (1); and

(B) that is signed by all affected parties in such case on or before the later of—

(i) December 31, 1997, or

(ii) the date that is 270 days after the date on which such release is first sent to the persons (or the legal representative of such persons) to whom the payment is to be made.

FA 701-06; Pet. App. 69-70.[4] Thereafter, the district court removed Mull from PSC. FA 709.

5. On May 8, 1997, the district court entered final judgment certifying the settlement class, approving the class settlement, and ordering the parties to implement the settlement agreement according to its terms. Pet. App. 78-80. The court held that the cost and fee provision of the settlement, which created a separate $40 million fund from which reasonable attorneys' fees were to be paid, was fair and reasonable to the class, but the court reserved decision regarding the payment of such costs and fees. Pet. App. 79-80. The court entered final judgment pursuant to Fed. R. Civ. P. 54(b), and reserved exclusive jurisdiction for purposes of supervising implementation of the settlement and allocation of fees. Pet. App. 80. (As of this date, some claims for attorneys' fees have been paid from the fund, but the district court has yet to rule upon petitioners' principal claims for fees and has not awarded fees to PSC.)

Two appeals were filed by nonparty class members, but were voluntarily dismissed. FA 710-13; *Dowling v. Alpha Therapeutic Corp.*, No. 97-2410 (7th Cir., appeal dismissed July 16, 1997); *Otis v. Bayer Corp.*, No. 97-2556 (7th Cir., appeal dismissed July 24, 1997).[5]

6. Six weeks after the judgment approving the class settlement was final, this Court decided *Amchem Prods.*,

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[4] The district court did provide that individual class members would be allowed to opt out if they showed "exceptional circumstances" supporting their untimely request. FA 709a-c.

[5] Fractionators initially moved to dismiss the appeals on the ground that appellants lacked standing. *See In re Brand Name Prescription Drugs Antitrust Litig.*, 115 F.3d 456, 457-58 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 1337 (1998). Thereafter, the parties and the putative appellants agreed that the putative appellants could opt out of the class.

Inc. v. Windsor, 521 U.S. 591, 117 S. Ct. 2231 (June 25, 1997). Within days, fractionators received a letter from Arceneaux (a) stating that he and Mull had filed competing class actions in Louisiana state court, (b) suggesting that a class settlement "may not now be available" in federal court, and (c) proposing a state court class settlement with Mull and Arceneaux as plaintiffs' counsel to solve "issues that are now subject to great uncertainty." FA 714-15.

On August 15, 1997, Mull wrote to fractionators asserting that *Amchem* "threatens the legitimacy of this settlement as a 'class' " but stating that his clients wanted to accept fractionators' settlement offer. FA 716-17. He then requested that settlement checks be prepared with his name and that of a colleague as co-payees with his clients. FA 716. This request appeared to conflict with the settlement agreement, which provided that attorneys were not entitled to any percentage of the settlement monies paid to class members. FA 37-38 § L(2). Mull also stated that his firm was asserting a lien against the cost and fee fund. FA 717.

Mull, Spece, and Ibanez subsequently filed purported liens against not only the cost and fee fund, but against fractionators' assets generally. FA 718-21, 869-77.[6] When fractionators moved to enforce the fee provisions of the settlement agreement, petitioners challenged the validity of the settlement. FA 722-23, 731-32, 791-92; Pet. App. 16-17.

Petitioners asserted that the class settlement was a nullity and that fractionators instead had made 6,000 individual settlement offers to pay $100,000, net of attor-

[6] Petitioners later recharacterized the putative liens against fractionators' corporate assets as causes of action that they would pursue in separate litigation. Opp. App. 17a.

neys' fees, to class members. Pet. App. 17; Opp. App. 5a, 20a, 22a-23a. According to petitioners, for each individual settlement offer that was accepted, fractionators had to pay an additional $50,000 or more to complaining attorneys.[7]

On January 6, 1998, Mull filed in Louisiana a lawsuit asserting that fractionators had tortiously interfered in the contingent fee contracts between Mull & Mull clients by, *inter alia*, directly communicating with Mull clients, attempting to limit Mull's fee recovery to the $40 million cost and fee fund, and attempting to compel the district court to abrogate Mull's contingent fee contracts. Pet. App. 106-23. The complaint sought not only the alleged fees, but also punitive damages. Pet. App. 122-23.

On January 7, 1998, the parties appeared before the district court. Counsel for Mull & Mull told the district court that the firm never intended to abide by the fee provisions of the class settlement:

> MR. ARCENEAUX: [T]he point is Mull & Mull could not have attacked the settlement without incurring some problem with the clients that it had that wanted to opt in. So it made the conscious election relying upon federal jurisprudence, since it had not been cited, it had not been served, it had not been named as a defendant or a class member, that if it stood by and let this class be certified, if certification became a problem for it, that at the appropriate time, it would have the absolute right under federal law to raise whatever issues it needed to raise when

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[7] Since Mull & Mull had a 33% contingent fee arrangement with certain clients, that firm contends that fractionators' $100,000 payment to each settling Mull client obligated fractionators to pay $50,000 to Mull. Since Mull claims to represent 318 claimants, the firm seeks more than $16 million in attorneys' fees. Spece and Ibanez seek $66,000 per claimant, based on a 40% contingent fee contract. *See* FA 741-42; Opp. App. 82a.

it was appropriate to defend its rights and its own clients' rights were no longer in jeopardy. That is the reality.

THE COURT: So you are saying that they had the intent all along, Mr. Mull had the intent all along to challenge the settlement once it had been effected?

MR. ARCENEAUX: They had the intent all along to collect their contingent fees.

Opp. App. 51a. The Mull firm stated its intention to file additional lawsuits in other courts relating to Mull's fee demands. Opp. App. 16a-17a, 94a. Spece and Ibanez asked the district court to award them compensatory and punitive damages for fractionators' supposedly tortious conduct with respect to fees and indicated that they too might file additional lawsuits related to the class settlement. Opp. App. 67a; FA 802-03. The court warned petitioners that it was considering enjoining them from pursuing any such litigation. Opp. App. 94a-95a.

On February 18, 1998, the district court granted fractionators' motion to enforce the attorneys' fees provisions of the class settlement. Pet. App. 11-29. The court ruled that complaining attorneys were (a) bound by the settlement, which superseded contingent fee contracts, and (b) estopped from attacking the class settlement now. Pet. App. 19-21, 28-29. The court held that the judgment approving the class settlement was final prior to the *Amchem* decision, and reiterated that the settlement did not present the problems raised in *Amchem*. Pet. App. 18-19. Specifically, the district court observed that "[t]he considerations which prompted the Supreme Court to set aside the judgment in *Amchem*—primarily the lack of any genuine adversarial process and the lack of any guarantee of fair representation of absent class members—are simply not present here." Pet. App. 19. The court also rejected petitioners' claims that the releases constituted 6,000 individual offers to settle that superseded any class settlement and that the releases deviated from the terms of the

settlement agreement. Pet. App. 22-26. Finally, the district court held that the liens asserted by petitioners were invalid and enjoined petitioners from pressing their demand for fees related to the class settlement before any other court. Pet. App. 26-29. Mull, Spece, and Ibanez appealed.

With the assent of the district court, fractionators had deferred making settlement payments to petitioners' clients while the district court considered petitioners' claim that the class settlement was void. Opp. App. 1a-3a. Fractionators resumed these payments after the district court ruled on February 18. Nevertheless, Mull petitioned for a writ of mandamus seeking an order directing fractionators to make the payments that they were already making.[8]

8. The court of appeals consolidated the mandamus petition with the appeals and affirmed the order of the district court in an unanimous and forceful decision by Chief Judge Posner. After recounting the history of the factor concentrate litigation,[9] the court of appeals observed:

> [Petitioners] accuse the lawyers for the class and for the defendants—groundlessly, as far as we can tell—of defamation, bait-and-switch tactics, hoodwinking, infamy, dishonesty, illegality, intimidation, extortion, hyprocrisy, hysteria, and Marxism. *Yet they did not oppose the settlement.* They objected initially to the amount of the settlement but their objection was rejected after a hearing and they did not renew their opposition or appeal from the consent decree, of which their clients have, as we noted, taken full ad-

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[3] Ironically, Mull now complains that fractionators improperly rushed payment to class members. Mull Pet. 20.

[9] The panel that heard this case (Posner, C.J., and Bauer and Rovner, JJ.) was well-acquainted with proceedings in *In re Factor VIII & IX Concentrate Blood Products Prod. Liab. Litig. (MDL-986)*, having ruled upon two previous mandamus petitions produced by the multi-district proceedings.

> vantage. And at no time did they object to the attorney's fee provision of the settlement.

Pet. App. 3 (original emphasis).

The court of appeals ruminated, in dicta, that the settlement "may well be questionable, both in its form . . . and its terms," Pet. App. 4,[10] but emphatically stated:

> [*T*]*here is no question of the district court's having exceeded its jurisdiction in entering the decree.* All the requirements of Article III were satisfied.
>
> Even if they had not been, it is unlikely that the settlement could be set aside at this late date. . . . The principle that jurisdictional defects may be noticed at any time is limited . . . by the equally important principle that litigation must have an end. *After a case has become final by exhaustion of all appellate remedies, only an egregious want of jurisdiction will allow the judgment to be undone by someone who, having participated in the case, cannot complain that his rights were infringed without his knowledge.*

Pet. App. 4-5 (emphasis added). The court of appeals further held that, "[h]aving participated in the settlement proceeding and having failed to make timely objection to it, [petitioners] are barred by the principles of waiver and equitable estoppel from challenging the settlement after it has become final and the defendants have paid and the class members have received hundreds of millions of dollars." Pet. App. 7-8.

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[10] The court of appeals cited and distinguished *Amchem*, 521 U.S. 591, 591, 117 S. Ct. 2231, and characterized as "downright weird" the structure of the settlement, which paid identical sums to all claimant groups "even though the strength of their cases (some of which appear to be barred by the statute of limitations) and the amount of their damages must vary greatly." Pet. App. 4. *But see* Pet. App. 70-71 (discussing outcome of cases tried prior to class settlement and strength of class members' claims).

The court of appeals also addressed petitioners' allegations of fraud, describing them as—

> fantastic and even preposterous. The most fantastic is the claim by one of them [Mull] that he was on the verge of negotiating a $1.8 billion settlement with the defendants when the class lawyers by a dastardly maneuver preempted him by agreeing to accept a measly $600 million. If this were true, which we do not for a moment believe, the lawyer would have been ethically obligated, as well as impelled by powerful motives of self-interest, to bring this to the attention of the district judge in the hearing that the judge conducted (and the lawyer attended) on the fairness of the settlement.

Pet. App. 7.

Finally, the court of appeals held that the district court had properly exercised its authority under the All Writs Act, 28 U.S.C. § 1651, in enjoining petitioners from attempting to enforce their contingent fee contracts or liens. The court of appeals called petitioners' claim that they were entitled to file suit in other jurisdictions "a dagger aimed at the heart of the settlement and therefore properly enjoinable." Pet. App. 8. The court stated that petitioners' attack on a settlement in which their own clients were participating "raises serious ethical concerns" and constituted a "sufficient danger" to their own clients to warrant the district court's injunction. Pet. App. 9. The court of appeals denied a petition for rehearing by Spece and Ibanez.

REASONS THE PETITIONS SHOULD BE DENIED

The petitions raise no issue worthy of this Court's review. Petitioners cite no authority—and there is none—for the proposition that they can represent clients participating in an enormous class settlement, lie to the district

court about their support for that settlement, and then, after the district court has entered final judgment approving the settlement, attack that judgment in order to evade the settlement's explicit fee provisions. Petitioners can indignantly cite Article III and *Amchem* until the end of time. But that does not change the fact that they are legally and equitably barred from attacking the judgment of the district court.

Even if petitioners were not barred, the jurisdictional and *Amchem* arguments that they attempt to raise are not properly presented here. As the district court and the court of appeals concluded, the record demonstrates that the district court had Article III jurisdiction. Petitioners' disagreement with that holding has no legal support and is, at best, a request for correction of putative error that petitioners could have raised before the judgment approving the class settlement became final. *Amchem* simply does not apply because it was decided after the final judgment that approved the factor concentrate class settlement. In any event, this settlement does not involve the conflicts in class interests at issue in *Amchem*. Approval of this settlement was within the discretion of the district court, and questions regarding the manner in which the court exercised its discretion are not an appropriate basis for reopening a final judgment.

Petitioners' remaining arguments are inherently fact-bound requests for correction of nonexistent errors. These claims do not warrant review by this Court and most certainly do not support a challenge to a final judgment that has already placed almost $600 million directly in the hands of settling class members.

I. Certiorari should be denied because the petitioners are barred from challenging the final judgment of the district court that approved the class settlement. Petition-

ers were actively involved in the multidistrict factor concentrate litigation and the process that led to final approval of the class settlement. Thomas Mull was a member of Plaintiffs' Steering Committee at the time the class settlement was negotiated and approved. FA 210-18, 709. He is listed as counsel on the class complaint and the motion filed by class counsel seeking final approval of the settlement. FA 455. A Mull colleague expressly told the district court that "they were not opposing the settlement" and "the settlement should go forward." FA 613, 630. Mull never objected to the fee provision that was an integral part of the class settlement agreement or suggested that his interests were in conflict with those of his clients. Pet. App. 12. Similarly, Spece and Ibanez participated in several hearings relating to the settlement without ever suggesting that it was void. Pet. App. 12. They complained that the cost and fee fund was too small, but they expressly waived that objection to the class settlement. Opp. App. 99a. Only after the settlement was final did these attorneys assert their outrageous fee demands and launch their attack on the settlement in an attempt to extort more money from fractionators. Petitioners' self-interested attack on the class settlement comes too late.

A. Mull argues that petitioners' bushwacking litigation tactics do not matter. According to Mull, petitioners are not bound by the final judgment approving the class settlement because they are not "parties" to the factor concentrate litigation. Mull asserts that the lower courts erred by "ignor[ing] the well established rule that no one is required to defend, or appear, in litigation unless named as a party." Mull Pet. 28. He asks this Court to grant certiorari to correct this error.

Not surprisingly, none of the cases cited by Mull supports the bizarre proposition that a final, judicially-

approved class settlement that includes specific provisions governing attorneys' fees does not bind attorneys who participated in the proceedings.[11] The fact that petitioners are not "parties" is irrelevant. As this Court has observed, nonparties can be bound by a judgment. *See Richards v. Jefferson County*, 517 U.S. 793, 798 (1996).

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[11] Most of the cases cited by Mull do not involve challenges brought by attorneys. *See Martin v. Wilkes*, 490 U.S. 755 (1989) (firefighters who failed to intervene in employment discrimination proceedings in which consent decrees were entered could subsequently challenge employment decisions made pursuant to those decrees); *Richards v. Jefferson County*, 517 U.S. 793 (1996) (taxpayers who did not participate in prior litigation over the constitutionality of county's occupation tax could challenge the alleged unconstitutional deprivation of their own property); *Local No. 93 v. City of Cleveland*, 478 U.S. 501, 529-30 (1986) (consent decree between association of black and Hispanic firefighters and city could not "dispose of the valid claims" of nonconsenting labor union or "[impose] obligations" on it); *see also Rossi v. Boston Gas Co.*, 833 F. Supp. 62 (D. Mass. 1993) (without adequate proof that employee benefit plan had been served with process, plan was not a party properly before court in ERISA action); *Warnock v. Pecos County, Texas*, 116 F.3d 776, 778 (5th Cir. 1997) (incorrectly cited in Mull Petition as *Tank v. Southern Methodist Univ.*, 116 F.3d 775 (5th Cir. 1997)) (holding in case involving § 1983 claims brought by county auditor against state district judges there was no "privity between the county and the judges in their individual capacities").

The few cases involving attorneys do nothing to support petitioners. *See United States v. Schwimmer*, 968 F.2d 1570 (2d Cir. 1992) (appellate counsel could receive payment from court-controlled assets, pursuant to a stipulation with the government, after Schwimmer entered into a RICO Forfeiture Settlement Agreement with the government); *Fleming v. Lake Delton Dev. Co.*, 241 F.2d 865, 366 (7th Cir.), *cert. denied*, 355 U.S. 821 (1957) (district court could not extinguish attorney lien simply by mailing notice to the attorney, who had withdrawn from the case some time earlier and was no longer participating in proceedings); *Britton v. Seale*, 81 F.3d 602, 606 (5th Cir. 1996) (attorneys sued for malpractice not barred from contesting probate court order that transferred from deceased mother to her children any claims against profes-

Attorneys are officers of the court. When they appear before the court, they submit themselves to its inherent authority. *See Theard v. United States,* 354 U.S. 278, 281 (1957); *In re Orthopedic "Bone Screw" Prods. Liab. Litig.,* 132 F.3d 152 (3d Cir. 1997); *Skelton v. General Motors Corp.,* 860 F.2d 250 (7th Cir. 1988), *cert. denied,* 493 U.S. 810 (1989). Persons who have had the opportunity to litigate an issue before a court entered final judgment are barred from raising the issue on collateral attack. *Lambert v. Conrad,* 536 F.2d 1183, 1185 (7th Cir. 1976). This bar extends to jurisdictional challenges to a judgment. "It has long been the rule that principles of res judicata apply to jurisdictional determinations—both subject matter and personal." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702 n.9 (1982).

The doctrines of judicial and equitable estoppel also bar petitioners' attempt to play "fast and loose" with the courts and the parties.[12] *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.,* 81 F.3d 355, 360 (3d Cir. 1996); *see also DeGuiseppe v. Village of Bellwood,* 68 F.3d 187, 191 (7th Cir. 1995) ("courts are under no compulsion to heed the shifting theories of 'chameleonic litigants' "). Here, petitioners admitted to the district

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sionals where defendants were not parties to the probate proceeding and did not represent any parties at the time the court approved the assignment).

[12] Judicial estoppel bars a party who successfully takes a position in one case and obtains a favorable final judgment as a result from later assserting the opposite of that position. *See Kale v. Obuchowski,* 985 F.2d 360, 360-61 (7th Cir. 1993) (litigant could not assert that he owned property in bankruptcy proceedings, after having previously asserted that he did not own the property while negotiating a property settlement in divorce proceedings). The elements of equitable estoppel are misrepresentation, reasonable reliance, and detriment. *FDIC v. Rayman,* 117 F.3d 994, 1000 (7th Cir. 1997); *Cange v. Stotler & Co.,* 826 F.2d 581, 585 (7th Cir. 1987).

court that "they *knew from the beginning*, even while they were urging the court to approve the settlement, that they would attack the limitation on attorneys' fees" and "contend that the 'settlement only' class was invalid." Pet. App. 20-21 (original emphasis). The district court concluded that petitioners' "conduct is a classic example of behavior which invokes the doctrine of equitable estoppel. By their affirmative acts and their silence when there was clearly a duty to speak, they intentionally mislead *everyone* in the case—the defendants, the class counsel, the court and their own clients—into believing that they approved of the settlement, including the limitation on attorney's fees." Pet. App. at 11-12 (original emphasis). *Accord* Pet. Opp. 7-8 (court of appeals opinion).

Mull argues that plaintiffs' attorneys were foreclosed from objecting to the settlement because they had a conflict of interest: the settlement was good for their clients, but bad for attorneys because it deprived them of their right to collect their contingent fees. *See* Mull Pet. 27. However, no ethical dilemma is created by a settlement proposal that does not award plaintiffs' attorneys their full fee expectations. This Court has held that even a settlement offer conditioned upon a waiver of attorneys' fees does not present an ethical dilemma "in the sense that [the attorney] had to choose between conflicting duties under the prevailing norms of professional conduct." *See Evans v. Jeff D.*, 475 U.S. 717, 727 (1986) (upholding settlement in civil rights case conditioned upon waiver of statutory attorneys' fees). The attorney must evaluate the settlement based on the clients' interests and may not thereafter seek to reform the settlement to obtain more money for himself. *Evans*, 475 U.S. at 741.[13]

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[13] Mull attempts to distinguish *Evans* by arguing that it was a statutory fee shifting case in which the fee belongs to the client, as opposed to a contingent fee case, in which Mull assserts that the

Moreover, even if the class settlement created a genuine conflict of interest—and it did not—petitioners were not entitled to remain silent. They were under a duty to tell the district court about the putative conflict before final judgment was entered. *See* Model Rules of Professional Conduct Rule 1.7 comment 2 (1995) (if conflict arises after representation has been undertaken, attorney should seek permission to withdraw from representation). Further, petitioners cannot rely on the purported conflict, which relates only to attorneys' fees, to excuse their failure to raise jurisdictional and other challenges that they now claim precluded settlement on a classwide basis.

In short, by their own conduct, petitioners are foreclosed from raising on collateral attack arguments that should have been raised before the final judgment was entered in this case. Certiorari should therefore be denied.

B. Petitioners Spece and Ibanez try to avoid the bar to their arguments by asserting that this case presents an important issue about "when attorneys fees issues are to be reviewed." Spece Pet. 20.[14] As the court of appeals

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fee belongs to the lawyer. Mull Pet. 27. However, attorneys do not have an absolute right to recover contingent fees. *See Krause v. Rhodes*, 640 F.2d 214, 219-20 (6th Cir.) (affirming district court approval of a settlement that limited attorney's fee recovery to $75,000), *cert. denied*, 454 U.S. 836 (1981). More specifically, they are not entitled to sign up large numbers of potential claimants "to secure for themselves huge attorneys' fees under individual contingency fee contracts that bear little or no relation to the actual work to be done or the risks in the case." *In re A.H. Robins Co., Inc.*, 182 B.R. 128, 138 (E.D. Va. 1995) (internal citation omitted), *aff'd*, 86 F.3d 364 (4th Cir.), *cert. denied*, 519 U.S. 993 (1996).

[14] Spece and Ibanez contend that this case presents the identical issue before the Court in *Cunningham v. Hamilton County Ohio*, No. 98-727, in which this Court will decide whether an attorney may seek interlocutory review of an order imposing sanctions. Spece Pet. 20. Spece and Ibanez also cite a purported conflict between the Third and Fifth Circuits regarding the timing for appeal-

recognized, the establishment of the $40 million cost and fee fund as the exclusive source for payment of attorneys' fees was one of the integral provisions of the class settlement. Pet. App. 5. Petitioners chose not to appeal that final judgment, which explicitly found the fund to be reasonable and fair to the class. Pet. App. 79-80. There is nothing about their tactical decision that would warrant a grant of certiorari.

II. Even if petitioners' collateral attack were not legally and equitably barred, none of their claims would warrant review. Petitioners contend primarily that the class settlement was a fraud perpetrated by fractionators in order "to manufacture federal jurisdiction over a national 'in globo' settlement" in order to "abrogate the class members' contracts with their attorneys and divert those fees to the [Plaintiffs'] Steering Committee." Mull Pet. 15; *see also* Spece Pet. 17-19. Petitioners have jumbled together jurisdictional and Rule 23 analysis in an attempt to justify raising these arguments on collateral attack. The record does not support their wild allegations of fraud.

A. As the court of appeals concluded, "[a]ll the requirements of Article III were satisfied" with respect to the final judgment approving the class settlement. Pet. App. 4. It cannot be disputed that a genuine controversy exists between HIV-infected hemophiliacs and fractionators. The class settlement was negotiated and approved in the context of multidistrict litigation that had been underway since 1993. *In re Factor VIII & IX Concentrate Blood Products Prod. Liab. Litig. (MDL-986)*, 853 F. Supp. 454 (J.P.M.L. 1993). That litigation was hotly

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ing a fee award against one defendant when there has been a Rule 54(b) judgment as to that defendant. Spece Pet. 22. These cases are obviously inapposite.

contested. As the district court observed in approving the final settlement, "[t]he docket is over 70 single-spaced pages, one indicator of the extent of this controversy." App. Pet. 72. Dozens of hearings and pretrial conferences had been held and the court had ruled upon numerous contested issues, including almost 100 discovery motions. Pet. App. 72. Fractionators had twice filed petitions for writs of mandamus challenging orders of the district court. One of these petitions led to decertification of a "negligence issue" class. *In re Rhône-Poulenc Rorer Inc. ("RPR")*, 51 F.3d 1293, 1296 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995).[15] There can be no question here as to the vigorousness with which the factor concentrate litigation had been conducted or the adverse postures of fractionators and PSC. Pet. App. 19.

The complaint in the class action asserted that fractionators were liable under a number of negligence and strict liability theories. FA 377-93. Fractionators answered denying those claims. *E.g.*, FA 458-517. The settlement proposal negotiated by fractionators and PSC was not, as petitioners allege, a fait accompli presented for the district court to rubber stamp. *See supra*, at 5-9. After conditionally certifying the class, the court held two hearings to determine whether the proposed settlement was fair to class members. FA 518, 601. The district court stated that it would reject the class settlement if fractionators were unable to resolve most government and insurer reimbursement claims against class members, deferred a final determination on class certi-

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[15] The other mandamus petition challenged a district court order relating to the number of common-issue expert witnesses upon which fractionators can call in individual trials after remand. That petition was denied. *In re Rhône-Poulenc Rorer Inc.*, No. 97-3535 (7th Cir., March 11, 1998).

fication for months pending resolution of those issues, and even entered an order stating that it would deny certification if those issues were not resolved by a particular date. FA 572-82. If the class had not been certified and the settlement approved, fractionators and plaintiffs' counsel then would have litigated this case, just as they are litigating hundreds of other cases in the MDL and in state courts.

Petitioners nevertheless assert that there was no case or controversy because the parties had reached a tentative settlement agreement before the complaint was filed. Mull Pet. 15-16. If that were the law, courts would lack jurisdiction over most consent decree litigation. *See SEC v. Randolph*, 736 F.2d 525, 527 (9th Cir. 1984) (reversing district court judgment "holding that no case or controversy existed because the parties arrived in court with the proposed judgment in hand"). Courts also would lack jurisdiction to approve settlements in cases that had been litigated for years; under petitioners' theory, courts overseeing such cases would lose jurisdiction the moment the parties came to terms. "The fact that the parties have arrived at a settlement agreement, however, does not lead inevitably to the conclusion that no controversy exists between the parties up to the time the judgment is entered." *Amalgamated Sugar Co. v. NL Indus., Inc.*, 825 F.2d 634, 640 (2d Cir.) (holding consent judgment was entitled to res judicata effect), *cert. denied*, 484 U.S. 992 (1987).[16]

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[16] The cases cited by Mull are inapposite. *See Moore v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 47, 48 (1971) (no case or controversy when both sides argue that a statute is constitutional); *Muskrat v. United States*, 219 U.S. 346, 361 (1911) (declaring unconstitutional legislation that purported to confer jurisdiction on certain courts to determine the validity of certain congressional legislation); *Cleveland v. Chamberlain*, 66 U.S. 419 (1861) (no case or controversy where appellant had acquired substantially all of

Petitioners also argue that the district court lacked jurisdiction because class representative Susan Walker stated at the final fairness hearing that approval of the class settlement was desirable because it would provide compensation to persons like herself whose claims were time-barred. Mull Pet. 22; Spece Pet. 16. This has nothing to do with the Article III case or controversy requirement. If a defendant prevails on a motion for summary judgment on limitations grounds, the plaintiff's case is dismissed; the court does not lose jurisdiction. Therefore, the possibility that defendants could have asserted limitations as an affirmative defense against Walker did not deprive the district court of jurisdiction.[17]

B. Ultimately, petitioners' Article III argument collapses into their *Amchem* claim: they contend that the district court lacked jurisdiction because the class settlement fails to meet the standards established by this Court in *Amchem*, 521 U.S. 591, 117 S. Ct. 2231. Fractionators have four responses:

(1) *Amchem* was not decided on the basis of jurisdiction; it was decided on the basis of Rule 23. This Court specifically declined to address the Article III arguments

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appellee's interest and control of the debt disputed in the litigation); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) (district court's entry of judgment in favor of named plaintiffs did not moot their private case or controversy); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 54 (1997) (no case or controversy once state employee challenging Arizona's English-only law resigned state position); *Poe v. Ullman*, 367 U.S. 497, 503 (1961) (no justiciable constitutional question absent showing that statutes would be enforced against plaintiffs).

[17] Petitioners also argue that Walker was an inadequate class representative because she was susceptible to a limitations defense. Mull Pet. 22. Here, the susceptibility of Walker's claim to a limitations defense made her typical of the settlement class. Pet. App. 70.

raised by petitioners. *See Amchem*, 117 S. Ct. at 2244. Petitioners assert that the Court may reach those arguments in *Ortiz v. Fibreboard*, No. 97-1704, and that the present case should be held pending that decision. But the outcome of *Ortiz* will not control here. In *Ortiz*, this Court is reviewing an appellate court judgment entered in a direct appeal brought by dissatisfied class members—not a collateral attack by dissatisfied attorneys.

Even if *Ortiz* were to articulate a new jurisdictional rule governing class settlements, that result would not warrant a grant of certiorari here. As the court of appeals stated: "After a case has become final by exhaustion of all appellate remedies, only an egregious want of jurisdiction will allow the judgment to be undone by someone who, having participated in the case, cannot complain that his rights were infringed without his knowledge." Pet. App. 5 (citing *Stoll v. Gottlieb*, 305 U.S. 165, 171-72 (1938)). *See also Underwriters National Assurance Co. v. North Carolina Life and Accident and Health Insurance Guaranty Assoc.*, 455 U.S. 691, 706 & n.13 (1982); *Durfee v. Duke*, 375 U.S. 106, 113 (1963). Any new jurisdictional rule established in *Ortiz* could not retroactively establish "an egregious want of jurisdiction" two years ago, when final judgment was entered approving the factor concentrate class settlement.

(2) Petitioners do not have standing to argue—as they do—that certification of the settlement class violated the rights of class members under *Amchem*. A litigant may represent the rights of a third party only when those interests are similar. *See Singleton v. Wulff*, 428 U.S. 106, 114-15 (1976). Here, complaining attorneys are seeking to destroy the class settlement in which many of their clients are participating. Petitioners are representing themselves—not class members.

(3) To the extent that *Amchem* established new law governing class settlements, it does not apply to this case because *Amchem* was decided after final judgment was entered approving the class settlement. *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 95 (1993).[18]

(4) If *Amchem* applied here and petitioners had standing, certiorari should not issue to revisit the factor concentrate class settlement. As the district court concluded, this class settlement is fundamentally different from the putative class settlements in *Amchem* and *Ortiz*. Pet. App. 19. Here, the interests of one group of class members are not being sacrificed in favor of others. All eligible class members who follow the procedures for obtaining settlement payments are receiving substantial compensation—$100,000 for each claimant group. FA 8 § B. Persons who preferred to opt out and pursue individual litigation have done so without prejudicing their own interests. FA 18 § C(3)(e), 26 § F. No "futures problem" is presented because hemophiliacs who used factor concentrates during the early 1980s now know (or have it within their power to determine) whether they are HIV positive.

It is, of course, possible to question, as Judge Posner apparently does, the manner in which the settlement was structured. Pet. App. 4. Fractionators firmly believe that approval of the settlement fell squarely within the scope

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[18] Petitioners erroneously assert that fractionators "admi[tted] to this Court in their *amicus* filing in *Amchem* that affirmance of the Third Circuit's *Georgine* decision would invalidate the then pending *Walker* class." Mull Pet. 22; *see* Spece Pet. 4 n.1. Fractionators actually argued that the pending factor concentrate class settlement would be foreclosed if this Court adopted the Third Circuit rule that a class could be certified for settlement only if the class could have been certified for litigation. *Amchem* subsequently rejected that aspect of the Third Circuit's reasoning. 117 S. Ct. at 2243, 2248.

of the district court's discretion. *See Califano v. Yamanski*, 442 U.S. 682, 703 (1979). However, the question of whether the district court properly exercised its discretion is inherently factbound and does not merit review. That is particularly true here, where the judgment approving the settlement is final and virtually all class members have been paid.

C. To bolster their argument that district court jurisdiction was manufactured through fraud, petitioners make wild assertions about the settlement negotiations, the proceedings in the district court, and the manner in which settlement monies have been paid. *E.g.*, Mull Pet. 4-5, 7, 19-20; Spece Pet. 6-7, 8-10. Petitioners egregiously misrepresent the proceedings. Many of their allegations are unsupported by record citations. The court of appeals found petitioners' allegations of fraud to be "fantastic and even preposterous." Pet. App. 7; *see also* Pet. App. 3. The district court had already removed Mull from PSC for misleading class members with such allegations. FA 701-06, 709-709c. Petitioners' attempt to rewrite the history of this litigation does not deserve review by this Court.

D. Finally, petitioners allege that the releases sent to class members depart from the terms of the settlement agreement. The settlement agreement expressly provided that claimants would be required to sign releases in order to receive payment. FA 41 § M. Nevertheless, Mull points to the releases as evidence that fractionators used the cover of the class settlement to enter into thousands of individual settlements with class members. Mull Pet. 7-8. Spece and Ibanez claim that the releases actually deprive class members of consideration promised in the settlement agreement. Spece Pet. 24-27.

For the reasons stated above, petitioners do not have standing to raise these arguments. *See supra*, at 26.

Moreover, the interpretation of settlement documents is within the discretion of the district court. *In re VMS Sec. Litig.*, 103 F.3d 1317, 1321 (7th Cir. 1996) ("Given that the power to implement a settlement agreement between the parties inheres in the district court's role as supervisor of the litigation, the exercise of that power is particularly appropriate for deferential review"). The district court carefully reviewed the terms of the releases, the settlement agreement, and the final judgment approving the class settlement, and concluded that the releases were consistent with the settlement. Pet. App. 22-26.[19] The court of appeals did not find it necessary to address

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[19] The district court rejected the argument that paragraph 14 of the release shows that fractionators abandoned the class settlement. Paragraph 14 simply states that the claimant "would agree to the terms of this Release *even if* the Agreement were not part of a class settlement but rather a completely private settlement." FA 67 ¶ 14 (emphasis added). The conditional phrasing demonstrates that fractionators were not abandoning the class settlement. They merely sought protection from claimants who might collect the $100,000 class settlement payment and then attack the settlement in an attempt to obtain more money (a maneuver not unlike that attempted by petitioners).

The district court also rejected the argument that class members received less than promised under the settlement because the release waives claims against the United States and the states, a provision not contained in the settlement agreement. The United States insisted on this provision as a condition for releasing its subrogation claims against claimants. *See* FA 162, 175 at 6, § (b)(3) & App. A. Resolution of subrogation issues was a make-or-break concern for the class settlement and was specifically addressed in the notice and settlement agreement. *See* FA 572-82; FA 59; FA 46 § P. The district court found that the release provisions were "altogether consistent with the intent of the settlement agreement and cannot be regarded as a departure from its terms." Pet. App. 22. No class members objected to the waiver. Pet. App. 23. Rather, as the district court observed, "[t]he only objectors are Mull-Kozak and Spece-Ibanez, who seek to parlay the release requirement into a benefit for themselves. They completely ignore the fact that what they seek would be a substantial detriment to the class." Pet. App. 23.

petitioners' arguments about the release. Those arguments are factbound and do not merit this Court's review.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted,

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March 19, 1999

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MDL-986

No. 93 C 7452

THIS DOCUMENT RELATES TO:
IN RE FACTOR VIII OR IX CONCENTRATE
BLOOD PRODUCTS LITIGATION

No. 96 C 5024

SUSAN WALKER, Administratrix of the Estate of
Steven Walker, Deceased,

Plaintiff,

v.

BAYER CORPORATION, *et al.*,

Defendants.

ORDER

On January 7, 1998 the court heard oral argument on the pending motions pertaining to the question of whether the Fractionator defendants can be held personally responsible for the payment of plaintiffs' attorney fees in any amount exceeding the cost and fee fund established pursuant to the Settlement Agreement and this court's Order

of May 8, 1997. Attorneys Spece, Ibanez, Mull and Kozak claim a right to enforce their contingent fee agreements against the Fractionators and argue that the Fractionators are liable to them, on various theories, for compensatory and punitive damages as well. At the conclusion of the oral arguments the court took the question under advisement and is awaiting a further brief from the Fractionators which is to be filed by January 28, 1998.

Meanwhile, the court is receiving daily communications from attorneys Spece-Ibanez and Mull-Kozak urging that the Fractionators be ordered to make immediate payment of the settlement amounts to their opt-in clients. Their position is that the Fractionators are obligated for these $100,000 payments in any event, regardless of the outcome of the fee question, and that there is no reason to delay the payments. They further request that, if the court declines to order immediate payment, it enter an appropriate order that can be appealed at this time.

Should the court hold that the Fractionators could be liable for fees over and above the amount on deposit in the cost and fee fund, there would be a serious question as to whether they could still be held responsible for payment of the full $100,000 settlement amount to a client of an attorney potentially entitled to such an excess payment. During the arguments on January 7, 1998, the court indicated its view that the fee limitation is part of the consideration for the $100,000 payments. At the present time the court sees no persuasive argument to the contrary and is unwilling to require the Fractionators to make the $100,00 payments until the court has made a decision on the pending motions relating to fees. The Fractionators are hereby excused from making further settlement payments to the Spece-Ibanez and Mull-Kozak opt-in clients until further order of court.

The request to certify this order pursuant to Rule 54(b) of the Federal Rules of Civil Procedure is denied. The court will decide the pending motions as soon as possible after receipt of the Fractionators' brief on January 28, 1997. The question of whether the Fractionators should be required to make settlement payments before their entitlement to rely on the fee limitation aspect of the Settlement Agreement has been determined is not, in the court's view, a question as to which reasonable minds can differ. Moreover, the question of whether immediate payment should be required is inseparable from the question of whether, if the Spece-Ibanez and Mull-Kozak excess fee claims are valid, the Fractionators would still be bound to make the $100,000 payments called for by the Settlement Agreement.

DATED: January 16, 1998

ENTER:

/s/ John F. Grady
JOHN F. GRADY
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MDL-986

No. 93 C 7452

IN RE FACTOR VIII OR IX CONCENTRATE
BLOOD PRODUCTS

PRODUCTS LIABILITY LITIGATION

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN F. GRADY

Chicago, Illinois
January 7, 1998

* * * *

[11] THE COURT: Okay. Now, I think we can address the matter that we set for hearing today, and what I would like to do is to ask Mr. Spece and Mr. Arceneaux to help me in my understanding of their position. I think their position is pretty much a joint position, but to the extent they differ at all, they can let me know, and I think I will ask you to respond jointly to the questions I am going to ask.

All of these questions are prompted by what I must confess is some uncertainty on my part as to what your

position is in regard to the class action settlement. In what could be something of an oversimplification but which may, nonetheless, be useful for today's analysis, I think we could regard the settlement as having two aspects.

One aspect is the payment by the fractionators of the sum of $100,000 per class member and the establishment of a $40 million cost and fee fund which I will refer to hereafter as the fund. That is one aspect.

Now, in return for the fractionators doing that, they are released from liability to all members of the class who do not opt out of the settlement and are also released from any obligation to pay attorneys' fees in excess of the $40 million [12] deposited into the fund.

Now, what I would like to ask Mr. Spece and Mr. Arceneaux is whether you regard that settlement as extant today. Is that settlement in existence today?

MR. ARCENEAUX: Good morning, your Honor.

THE COURT: Good morning.

MR. ARCENEAUX: There are 6,000 individual pending settlements, but the settlement as you described it as a class action settlement with two component parts in my view is not extant today.

What has happened is I believe the defendants have made extended offers in the notice of class, that the offers were accepted by some 6,000-odd people when they opted into the settlement, that there may have been at some point a class settlement. I am not sure that that needs to be decided.

The important point is that at some point it was clear that the defendants made a counteroffer, if you will, in the form of a release that is outside the confines of the class settlement and that those people who were signing the release are accepting that counteroffer and are settling their cases outside the context of whatever settlement class still exists, if any. That is the way I view the 6,000 pending settlements and how they will eventually resolve.

I can expound on that if you want me to explain how I come to that conclusion or if you just—

[13] THE COURT: We are going to get to that. I basically—

MR. ARCENEAUX: That is my theoretical construct for how I see what is existing right at the present time.

THE COURT: All right.

MR. ARCENEAUX: 6,000 individual counteroffers that were made and by the release, most of which are being accepted.

I know of some instances where people have indicated they do not intend to sign the release. If the defendants choose to enforce the original offer, I suppose that will be a matter that will have to be resolved another day.

THE COURT: Now, you say 6,000 counteroffers. Counteroffer to what?

MR. ARCENEAUX: Well, I do have some trouble with that because there was an offer that was made in the notice, and it was accepted by the claim form opting in. So there was a binding contract.

To the extent that under Illinois law, if it were to govern—or I know under Louisiana law, this would be possible. Even though there is a binding contract, if I as the obligor in the contract say I am not going to perform but I will offer a counter-performance, will you take that, and the obligee says, yes, I will take that counter-performance, then the original contract is reformed by what is in essence a counteroffer.

[14] That is what I think has happened here. There was a binding contract by the notice and the opt-in claim form which constituted a valid offer and acceptance. But when the release came with different terms and clearly specified that it was operating outside of a class settlement arena and asks the releasor to warrant that in signing this release he is not doing so as a settlement class member but, in fact, is expressly not relying on your Honor's May

8th order and is relying upon his own independent decision to sign this release, which means that he had no legal obligation to do it, which is what makes that clause inconsistent with the notion that there is a settlement class, under that circumstance, it seems to me that the release is a suggestion that they are still willing to perform but on somewhat different terms.

And if the release is signed by the claimant, then there becomes a new binding contract.

THE COURT: Now, how do I know that the people who signed such releases had in mind that they were accepting a new offer and that the terms of the old offer were thereby abrogated?

MR. ARCENEAUX: That is an excellent question because I am afraid there are many people who probably don't realize that. The people I have consulted with, and I know the people Mr. Mull has consulted with, and I don't know about the Steering Committee and the 800 number, but I know from seeing [15] Internet postings many people were very concerned about the terms of the release being different from the original offer. And I believe Mr. Spece has a motion pending to reform the release, and I will leave that issue up to him because none of our clients have asked us to do that.

Almost all of them are willing to the terms of the release. So I do believe there are probably people out there who don't realize that the release doesn't conform to the original offer and that—

THE COURT: Now, let's take your argument the next step, assuming for purposes of the next step that the release did constitute some different or additional offer by the defendants, or at least a modification of the original agreement.

How do we determine what aspects of the original agreement were modified or changed by the releases?

MR. ARCENEAUX: I don't think you need to because the release is a complete contract in and of itself. It states that, if I am not mistaken, in one of the concluding paragraphs.

But, in any event, the release, and it is an extensive 17, I believe, some odd paragraphs, offers the defendants all protection they need and constitutes a complete stand-alone agreement.

THE COURT: What does it say about the hundred [16] thousand dollars?

MR. ARCENEAUX: It says that it will—

Well, actually, it says several things. It says inconsistently with the notion that this is an implementation of the original settlement, it says that there will be no obligation to pay the hundred thousand dollars until this release is signed and approved, that there is no settlement until a judgment of dismissal is entered in those cases that are pending in various Courts. And as to the amount, it continues to specify $100,000 although in some respects there are some changes in the amounts which I could get into in particular.

THE COURT: What does the release say about attorneys' fees?

MR. ARCENEAUX: The release says that each party shall bear its own attorneys' fees. And then it says the defendants obligation to attorneys' fees is limited to the cost and fee fund.

THE COURT: Now, have the people who signed the releases by their act of signing agreed to those terms?

MR. ARCENEAUX: They have. Unfortunately under both Illinois law, or not unfortunately, as I view it—fortunately under both Illinois and Louisiana law, they have no ability to eliminate the attorney's right to fees.

If the defendant has offered $100,000 net of [17] attorneys' fees, which is has offered to do, I don't believe

that is in dispute, and nobody has ever suggested that the clients are entitled to less than the full hundred thousand dollars—once the liens were perfected, the defendant has no ability and the client has no ability to agree to such an arrangement where the attorney would not get paid and his funds would be limited to a single source in an amount arbitrarily determined by the defendants, or even if it had been agreed upon by the client and the defendants.

And there I use the analogy in my memo to an interpleader where the stakeholder comes into Court and deposits a sum of money and says, here, claimants, fight over this, and, in essence, the $40 million. And the cases are very clear that the claimants in an interpleader action are not limited to that fund. They can contest the fund. They can draw on the stake, but they can also countersue the stakeholder and claim that the fund is insufficient.

In effect, that is what the defendants have done. That is what the $40 million and the fee fund in my view represents. It is the attorneys' fees that they would otherwise owe, much of which is owed to the Steering Committee and class counsel for efforts conducted in connection with litigation over which the Court had jurisdiction and class counsel worked very hard for.

THE COURT: How do I know that these people—[18] By the way, I think we will go faster if you just answer my question.

MR ARCENEAUX: I will try to confine myself.

THE COURT: You will have a chance to state your position fully, but we will move ahead faster if you just give me short answers to my questions.

MR. ARCENEAUX: I will try.

THE COURT: How do I know that the people who signed these releases believe that in signing them they were abrogating the part of the settlement agreement that limited the defendants' obligation for fees to the $40 million fund?

MR. ARCENEAUX: I am not sure I follow the question, but I don't believe that their intention to abrogate that is germane to my position. They may have intended that, and if they did, that is only further proof of my state court action now pending against the defendants for interference with contractual relations.

THE COURT: What is it—

MR. ARCENEAUX: I am sorry.

THE COURT: What is it then that resulted in the abrogation of the limitation if it wasn't the intention of the releasors to do so?

MR. ARCENEAUX: There is no extant legal limitation. It is not as if—

When the defendants abandoned the settlement—and [19] these actions are now proceeding as individual settlements in Louisiana state court where all of Mull & Mull's clients' claims are pending. Under Louisiana law, when those cases settle, if there is a perfected lien, either the client or the defendant owes attorneys' fees. And the client and the defendant can't unilaterally agree to limit the defendant's liability.

So if what is being resolved here is a Louisiana state court case by the signing of this release, which the release clearly contemplates by its own terms, then this Court—any extant remnants of its May 8th order which might limit attorneys' fees doesn't apply to that because that case has been settled outside the—

THE COURT: What you are saying then is that the terms of the releases have nothing to do with Mull and Spece's entitlement to attorneys' fees beyond the $40 million fund.

MR. ARCENEAUX: Other than to the extent that the release gives rise to—for intentional interference with their contracts, that is correct.

THE COURT: So even if the releases—

MR. ARCENEAUX: Said nothing.

THE COURT: —had contained no provisions to which you now object, your position would be the same in regard to what you say is the lack of any authority to displace the contingent fee.

[20] MR. ARCENEAUX: That's correct.

THE COURT: All right. By the way, Mr. Spece, if at any time you disagree with anything that Mr. Arceneaux is saying, please indicate that; otherwise I will assume that you and he are on the same page on these things.

MR. SPECE: Your Honor, then I think it would be appropriate for me to comment somewhat on the questions you have already ventilated.

THE COURT: Okay.

MR. SPECE: Your Honor, I do agree that the original contract agreement of the class settlement does not exist. However, one of the—

We base it not only on the theory that there has been a material change in the contract and which constituted an abuse of process in the use of this—

THE COURT: Let me hold that. I am going to get into the question of what the differences are at a later point. Basically I just want to get your structural answer as to whether this agreement is still in place.

MR. SPECE: Okay. Let me then look at the other reason that I don't think was eliminated by my colleague, and; that is, that we are requesting discovery because we believe there are facts in the record that suggest that there was an improper intent from the beginning by these defendants to use this Court and the legal system to perpetuate a fraud on the [21] clients and on the attorneys who represented those clients.

This was not a bona fide expectation of a legitimate class settlement but, rather, a device by which the defendants could go directly to attorneys' clients, urge them to settle without the advice of their counsel as to strong cases, and at the same time to limit the attorneys' fees to

an unreasonably low amount, exploiting a conflict of interest that existed in the class counsel and in the inherent nature of the situation.

Now, these are serious charges. This is why we have asked for additional discovery. But we submit that the subsequent changing of the release is not divorced from this because even if your Honor doesn't accept the theory that there was an independent contract simply because of the changes from the notice of the release, this bears on the original intent.

And if the original intent was to approach the community with an offer, and then all along the releases were expected to state explicitly that you are not relying on a finding of fairness via class counsel, you are not relying on a finding by Judge Grady, and, by the way, we are going to use the attorneys' fees which the attorneys to this date could have reasonably expected would be disseminated in a fair and equitable manner and might make unnecessary additional claims for attorneys' fees in the form of interference with contract and other tort theories —if they have this all in mind—and I will reiterate; one of the mechanisms used, and it bears on [22] this question, is if you opt in all of your clients, then we will look favorably on your request for attorneys' fees.

There has been a manipulation to force people to opt in to counsel their clients regardless of the merits. And on this matter of conflict of interest, I simply want to tender, because I think the current proceedings are a microcosm of the entire litigation, and—

THE COURT: Mr. Spece, you are really getting ahead of where I want to be at this point. So let me get back to Mr. Arceneaux.

The reason I am asking these questions is that the arguments that have been submitted in the briefs are somewhat diffuse, and what I am trying to do is to crystal-

lize your positions here so that I can understand them better than I do.

MR. ARCENEAUX: I am sorry, your Honor.

THE COURT: Go ahead.

MR. ARCENEAUX: I might add to Mr. Spece's comments that he and I are not on different pages there. I think his explanation eloquently explained why the release. It is the motivating factors that supply the defendants' intent to change the deal, and I agree with him a hundred percent in his assessment.

THE COURT: Now, let me ask this. Do Mr. Mull and Mr. Spece and Miss Ibanez believe that they have any rights under the order of May 8th, 1997, or under the settlement [23] agreement?

MR. ARCENEAUX: I believe Mr. Mull's clients have rights to claims.

THE COURT: That's not what I am asking.

MR. ARCENEAUX: All right. I believe Mr. Mull has rights to assert his lien against the $40 million that is under the jurisdiction of the Court. That may or may not constitute the cost and fee fund but certainly constitutes a fund of money subject to the jurisdiction of this Court's in rem powers.

I believe that Mr. Mull has a claim against the defendants for his attorney's fees which can be asserted against that sum of money under the jurisdiction of the Court who is the only one, I believe, who can adjudicate the fate of that sum of money.

And to the extent that the defendants do not make available to him from that sum the money to pay his fees, they are personally liable for the deficiency.

THE COURT: Well, now, what is it that would give Mr. Mull a right to anything in the fund?

MR. ARCENEAUX: It is not a right to the fund; it is a right to the money that is under the jurisdiction of the Court that was—

THE COURT: That is the fund.

MR. ARCENEAUX: Well, it may sound like semantics, but I don't believe it is, your Honor.

[24] THE COURT: Well, explain that.

MR. ARCENEAUX: I believe that that fund constitutes money that at one time was to be used to pay attorneys' fees and still is presumably, that it may or may not constitute the same fund that existed and was contemplated by the May 8th order. It is still a fund of money. That fund, as a defined term—

THE COURT: Well, I can tell you this. If it is not the fund that was contemplated by the May 8th order, Mr. Mull isn't going to get any of it under any circumstances.

Now, does he claim a right to recover from that fund or doesn't he?

MR. ARCENEAUX: He claims a right to recover from the defendants who may—

THE COURT: Not from the fund.

MR. ARCENEAUX: Exactly.

THE COURT: All right.

MR. ARCENEAUX: From the defendants who may choose to satisfy that obligation out of the fund.

THE COURT: But Mr. Mull renounces any claim that he may have to share in the $40 million fee fund.

MR. ARCENEAUX: That is not correct, your Honor.

THE COURT: Well, tell me what is correct.

MR. ARCENEAUX: We have asserted a lien against that sum of money.

[25] THE COURT: Okay.

MR. ARCENEAUX: I don't believe that you can release that sum of money.

I believe that that fund, that $40 million which may or may not constitute the fee fund, is $40 million under

this Court's jurisdiction over which we have asserted, and properly so, a lien.

THE COURT: But you are not saying that Mr. Mull's claim arises by virtue of any standing he has under the settlement agreement or the order of May 8th.

MR. ARCENEAUX: Mr. Mull's fees—right to fees from the fund?

THE COURT: Correct.

MR. ARCENEAUX: As to the contingency fee contracts, his rights do not arise—

THE COURT: No, no. Just answer yes or no.

MR. ARCENEAUX: I can't.

THE COURT: Does he claim any right by virtue of a standing under the order of May 8 to claim against the fund established pursuant to that order?

MR. ARCENEAUX: I can't answer yes or no because there's two parts. I can answer yes to one and no to the other.

THE COURT: All right.

MR. ARCENEAUX: As to his individual contracts with [26] his client and the contingency fees which he claims are due, his rights do not arise from the May 8th order. They arise from operation of either Illinois or Louisiana, most probably Louisiana law.

THE COURT: All of which is not to answer my question.

MR. ARCENEAUX: It does answer your question as to his contingency contracts. As to any right he may or may not have to claim fees as quantum meruit in reimbursement for work done by the plaintiffs' Steering Committee, I suppose that would in some respects arise as a consequence of the May 8th order although I don't believe it arises under it.

THE COURT: How would it arise?

MR. ARCENEAUX: Because the Court has jurisdiction over the $40 million.

THE COURT: Is it your view that Mr. Mull would be able to claim—and it is not clear to me from the briefs whether he is claiming $33,000 or $50,000 out of each $100,000 payment. But let's assume it is $33,000.

Is it your position that he is entitled to claim 33,000 from the fractionators for each of his clients and then, in addition to that, claim some kind of quantum meruit payment out of the fee fund?

MR. ARCENEAUX: If Mr. Mull gets the contingency fee contracts, I believe that there is no question we would waive quantum meruit on the Steering Committee.

[27] But if I may add just one small point here, your Honor, in the interest of trying to shorten things. This is not really the position that I have taken in the memo, and these are not issues that we have asked the Court to adjudicate. In fact, they are issues we have asked you to refrain from adjudicating because we believe that they are improperly asserted here.

What happens vis a vis Mr. Mull's rights and the defendants is not an issue that your Honor need to be concerned with. All it needs to do is dispose of this fund. To the extent that we receive money out of the fund which we believe we are entitled to do, the defendants will then be able to use our receipt of that money as a defense in state court, and the Louisiana state court will decide whether our receipt of money from that fund is a partial release of the defendants or a full satisfaction of the defendants' obligation.

THE COURT: Let me save you time, and I will save you the time of reiterating that kind of argument which gets us nowhere.

For this settlement to proceed, the rights of Mr. Spece and Mr. Mull against the fractionators must be determined here and now. For me to leave that determination

in some other forum at some later time would be to undermine the settlement that is taking place here and make impossible its completion.

[28] So we will proceed along the lines that I have initiated here, and I hope we will get to some resolution of the question.

Now, let me ask you this.

MR. ARCENEAUX: Mr. Spece may have a point.

THE COURT: I think I am going to ask Mr. Spece to sit down, and I will hear from him after I have heard from Mr. Arneneaux. And you can make notes, Mr. Spece, as to anything you differ about.

What is the source of the lien that Mr. Mull asserts against the fund?

MR. ARCENEAUX: It is Louisiana state law.

THE COURT: Okay.

MR. ARCENEAUX: And/or Illinois law.

We have not briefed the conflicts of law issue. My initial assessment is Louisiana law, but we have perfected liens under the laws of both states.

THE COURT: Now, the fund would, I assume, without deciding, but I assume that is part of the settlement, part of the settlement proceeds, and if you have a lien, it seems to me that that would probably be assertible against the fund although I would want to hear from the fractionators on that.

Do you claim that you have a lien that extends to the assets of the fractionators beyond the fund?

MR. ARCENEAUX: This gets into a discussion I had with [29] Professor Hazard about my improper use of the word "lien." The right we claim against the defendants while I had been calling it a lien is in reality, as he points out to me, not a lien. A lien is a claim, a priority, against a specific thing. So I think I will correctly describe our claim against the fund as a lien.

I believe what I described when I talked about the defendants' personal liability is, under Louisiana law, what we would call a cause and right of action that would make them personally liable. So to describe it as a lien against the defendants may not be correct.

THE COURT: So that really comes down to your claim for interference with contractual relations or something of that kind.

MR. ARCENEAUX: It has two component parts. One is a tort claim for interference with contract, abuse of process, unjust enrichment, and the various other tort claims including fraud.

The bigger part and I think the easier cause of action to resolve is a contractual matter. As I have described to you before, it is a third party beneficiary arrangement where, in order for the client to be paid $100,000, the client has stipulated that a third party will be paid attorney's fees.

Under Louisiana law we call that a stipulation pour autri, a-u-t-r-i, stipulation for the benefit of another. In [30] that instance, the stipulator, in this case the client, has an enforceable right as well as the beneficiary to enforce that contractual obligation.

THE COURT: Now, what has the client stipulated to?

MR. ARCENEAUX: The client has demanded as a consequence of the operation of law and the settlement that the attorneys' fee be satisfied by the defendants instead of by the client.

THE COURT: But pursuant to the terms of the settlement rather than pursuant to a contingent fee contract, correct?

MR. ARCENEAUX: Pursuant to the terms of the release.

THE COURT: Well, does the release change the amount of the plaintiffs' attorneys' fees?

MR. ARCENEAUX: The client is unable to contractually do that, whether the client intends to and agrees to or not. That is the whole point of our claim; that what the defendants have done is they have attempted to limit the client's obligation to their lawyers by agreeing with the client that the client's obligation would be limited.

And under both Louisiana and Illinois law, the client and the defendants are not free to limit the attorneys' obligation by abrogating in effect between themselves the contingency fee contract that the client has with the lawyer.

So in that respect, the client's intention and the [31] language of the release is totally irrelevant because the law says those parties cannot agree to circumvent the attorneys' rights.

THE COURT: My question had to do with whether the attorneys are asserting any rights under the order or the settlement, and I think you have answered that question.

MR. ARCENEAUX: When you say the settlement, I am assuming you mean—

THE COURT: I mean the settlement agreement.

MR. ARCENEAUX: The class action itself.

THE COURT: Correct.

MR. ARCENEAUX: Their rights are arising out of 6,000 individual settlements.

THE COURT: Now, let me get to the matter of the releases. And let's take point by point those provisions of the releases tendered by the defendants which you claim, Mr. Arceneaux, effectively rescinded the settlement agreement.

MR. ARCENEAUX: If I may just make one small correction?

THE COURT: Yes.

MR. ARCENEAUX: The release I do not believe rescinded the settlement. I believe the settlement agreement was void. The release is a reflection of the settlement agreement's essential nullity.

THE COURT: Well, now, when you say the settlement is [32] void, are you talking about Amchem?

MR. ARCENEAUX: Yes.

THE COURT: That is your fundamental point?

MR. ARCENEAUX: I believe that the release is a recognition by the defendants of the essential invalidity of the settlement, the indefensibility of it. So rather than face the prospect or the inevitability that the settlement would be declared void, or recognized as void is a more correct way to express it, the defendants went ahead and took care of their own business by crafting a release that divorces this settlement from the context of the May 8th order.

THE COURT: Well, now--

MR. ARCENEAUX: Although it attempts by some of its language to still invoke the May 8th order, if it is carefully examined, provision by provision, almost every paragraph has something in it that is inconsistent fundamentally with the notion that this release is the implementation of a class action settlement.

THE COURT: Well, let me ask you this.

Let's assume there had been no Amchem decision and these releases containing the identical terms that they contain had gone out. In that event, would your position be that the settlement was still in place?

MR. ARCENEAUX: My position would be for every person who signs this release, if his or her claim with the defendants [33] would have been compromised outside of the existence of an existing class action settlement, that by signing this release, the releasor and the releasee

agreed to compromise that claim outside the scope of the settlement class.

It is clear in the release when it requires the releasor to warrant in the release that he is not relying upon the May 8th order of the Court and is making an independent decision to sign this release, that the release order certifying that he is under no legal compulsion to sign the release or to go forward with the settlement, which he would be if this were a class action.

So that paragraph 14, which is the most blatant thing in the release that is inconsistent with the settlement, underscores that for anyone who signs this document, he has compromised the claim outside the context of the settlement class. There are also other provisions in the release that I believe more subtly but, nonetheless, suggest the same thing.

For example, I don't know if it would be appropriate at this time to go through it paragraph by paragraph.

THE COURT: Well, what I want to know is all parts of the release that have the effect of voiding the settlement.

MR. ARCENEAUX: Perhaps I can articulate my position better this way.

THE COURT: Okay.

MR. ARCENEAUX: I believe the settlement was void. I [34] believe for those people who signed the release, they have indicated unequivocally that they have resolved the claim outside the context of any settlement that either exists or purports to exist.

I believe the settlement is void. I believe that signing the release indicates the intention of the parties, that they have removed their settlement from the context of any void, voidable, or even existing settlement class, that they have gone outside that original settlement and confected, in effect, a side deal, if you want to call it such, or a new deal.

And I believe the reason why this is drafted this way is a recognition on the part of the defendants of the indefensibility of the settlement class. And in order to protect their own rights, which they certainly were cautious in doing, they drafted a release that divorces this agreement from the class settlement except in one instance where they invoked the existence of the settlement class, the only place where they purport to waive the settlement class as enforcible is in the area of attorneys' fees. Everywhere else they have not done so.

THE COURT: In your view, would the defendants have been able to renounce the settlement at the point of the Supreme Court decision in Amchem on the basis that they could no longer realize the protection they thought they were [35] achieving through the class action settlement?

MR. ARCENEAUX: I think once they deposited the $600 million in the trust fund, I believe the 6,000 settlements became irrevocable. Up until that point, it seems to me there is a plausible argument they may have been able to walk away.

THE COURT: Why would the deposit make a difference?

MR. ARCENEAUX: Because the deposit places the money outside the jurisdiction of the defendants to unilaterally withdraw and inside the jurisdiction of the Court.

THE COURT: Well, but what if the defendants came in and said they want the Court to enter an order abrogating the settlement?

MR. ARCENEAUX: I believe it is contract law, your Honor. If I am a promissor in a contract, I would make a deposit to secure the contract. It is an irrevocable offer.

So when they deposited the money and created the $600,000 fund and sent out almost simultaneously the releases, they made 6,000 individual offers, each of which

are secured by some money that is now under the jurisdiction of this Court in the form of a $600 million fund.

The offer at that point, and the defendants had full knowledge of the existence of Amchem—at that point I believe they made 6,000 irrevocable offers, which I believe your Honor has the jurisdiction to enforce because it has jurisdiction over the 6,000—the $600 million fund.

[36] THE COURT: The defendants were obligated under the settlement to pay a hundred thousand dollars to each class member. That was their contract existing at that time.

Could that obligation have been increased at the instance of any class member who said that he wished to sue for more on the basis that—

MR. ARCENEAUX: An opt-in class member who accepted the original—the offer proposed in the notice.

THE COURT: Right, who now says in view of Amchem, it is my desire to sue for more.

MR. ARCENEAUX: If he doesn't sign the release—if he does not sign the release, it is a done deal. If he or she doesn't sign the release, I believe they have the ability to proceed forward with an independent—

THE COURT: So this is a unilateral situation then where the fractionators were bound once they deposited the money but, having deposited the money, would not have the benefit of a reciprocal situation as to any class member who simply decided not to sign the release.

MR. ARCENEAUX: To some extent, and I will answer generically, but to some extent the answer to that may turn on differences in state law. I don't know the law, and I assume in that instance the law that would govern, that relation would be the law in the state where the offer was received.

It seems to me under conflict of law principles, that [37] is most likely. So I can't speak of every state, but

under at least the law of Louisiana, which I do know, when a deposit is made to secure an offer, it is a unilateral one-way offer, and that is perfectly recognized by the law.

I am telling you I would give you unlimited time to decide whether you want this. If you don't find—I can't force you to take it, but if you want it, it is there for you, and I have secured my promise to make it available by making a deposit.

THE COURT: One of the major benefits that the fractionators realized in this class action settlement is their release from liability to any class member who did not opt out and who didn't file a claim either. We have no idea how many of those are, but it seems reasonable to assume there may be several thousand of them.

At various times in this litigation we have talked about 10,000 class members. We have had 10,000—excuse me—6,000 claims filed. So it could be that there is a very substantial amount of litigation from which the fractionators are now releived if the class settlement is valid and binding.

Now is it your position, Mr. Arceneaux, that assuming the notice to the class was adequate, which I think it was, that any of the possibly 4,000 claimants still remainnig would be free to sue the fractionators?

MR. ARCENEAUX: Some of them will not be able to [38] because of the way the release is drafted and the signatures that are required.

Example: I have a client in Alabama who opted in. Her ex-husband and the father of their deceased child whom she hadn't seen for 20 years did not do anything. She received a claim approval, and we expected that under the terms of the settlement as approved, she would have received $100,000 since at that point there was a claimant group of only one because her husband no longer had a

viable claim under the bar order, and the settlement agreement said that.

The release comes along and now it requires the signature of her husband, who was not an opt-in or an opt-out, but in order to get her money, she would have to sign the agreement, reducing her original entitlement to $50,000, but the defendants for that extra 50 purchasing from her husband, protection from this lawsuit.

So there are instances where—

THE COURT: Let's assume that that claim would be barred. But in a situation where there is no such signature, would a class member be entitled to file suit?

MR. ARCENEAUX: Class member. You mean a person who did not opt in or out?

THE COURT: Correct.

MR. ARCENEAUX: Yes. I believe that is a risk that the defendants undertook when they deposited the $600 million. [39] They made an affirmative determination that going forward and resolving 6,000 claims was sufficient consideration for them to incur the risk that there would be former class members who would otherwise have been barred but may now bring suit.

I might add to that that nowhere in the release does it specify as an element of consideration resolution of any claim or benefits received therefrom other than resolution of a claim by the releasor. So in this offer, to any particular releasor, it is not specified that the defendants are receiving consideration in the form of some other benefits as to other claims or claimants.

THE COURT: Well, assuming it is an offer and not part of the—

Mr. ARCENEAUX: That's correct, your Honor.

THE COURT: —class settlement.

MR. ARCENEAUX: That's correct.

THE COURT: I would like you to explain to me, Mr. Arceneaux, how the class members are prejudiced by each of the provisions of the releases that you say depart from the settlement agreeement.

Now, you have already explained to me that to the extent the releases provide that the claimants have made their own independent determination concerning the fairness of the settlement, that in your view constitutes a new agreement, and you need not repeat that.

[40] MR. ARCENEAUX: Okay.

THE COURT: What I am interested in now in this specific inquiry is any element of prejudice that the claimants would experience by virtue of having signed the release in the form that it was submitted to them.

MR. ARCENEAUX: I am going to put aside and not comment on then the provisions of the release that may be—have the same ultimate effect as the settlement but, because of the way they are phrased, actually constitute an indication that it is not part of the settlement. I am going to put those aside and only comment on the provisions which produce a different outcome. I think that is what your Honor is asking.

For example, in whereas clause number 2 on page 1, the release waives all claims for infection with HIV virus and any other viruses.

Now, I realize the fractionators will take the position, and I don't know what view your Honor has on this, that the original settlement waived liability for all contaminations from the product, whether from HIV or otherwise. The settlement agreement contains language that suggests that. But the notice itself, when fairly read by class members, and I have talked to many who read the notice and were shocked at this provision—

The notice itself, when fairly read, only contemplates release of liability for HIV infection because it talks about

[41] waiving or releasing a claim, but nowhere in the notice is the word "claim" defined. The only place the word "claim" is specified in the notice in a context is when it talks about claims for HIV infection, which leads reasonably to the inference that what is at issue is claims for HIV infection and what is being resolved by the settlement or claims for HIV infection.

So to that extent I believe that there is one instance where the release goes far beyond the context of the notice.

THE COURT: So you are saying, for insance, that the release would cover hepatitis whereas the agreement doesn't.

MR. ARCENEAUX: Or CJD or any other unknown viruses, many of which their identity is unknown, but their existence is probably certain.

MR. MAGAZINER: I think that Mr. Arceneaux misspoke. He said the agreement makes it clear that it does cover hepatitis, but Mr. Arceneaux's point is that he claims a notice doesn't make that clear.

Is that correct?

MR. ARCENEAUX: I believe the agreement arguably extends to other sources of contamination. I believe it expressly refers to hepatitis. I am not sure about that.

But I know that there are provisions that I read that arguably extend to other sources of infection, but I believe the notice is limited only to HIV because of its failure to [42] define the word "claim."

THE COURT: All right.

MR. ARCENEAUX: That is a first example.

The second example—

THE COURT: Let me ask this. How many of Mr. Mull's clients had lawsuits on file that claimed damages for—

MR. ARCENEAUX: Other viruses?

THE COURT: —infections from other viruses?

MR. ARCENEAUX: I don't know.

MR. MULL: Hepatitis and other viruses, any unknown.

MR. ARCENEAUX: I might footnote my comment about the whereas clause by pointing out that in paragraph one of the release is where the actual waiver of liability for all viruses is contained. The whereas simply says that is the intention of the parties.

THE COURT: Let me ask you to refer me to the exhibit that is the—

MR. ARCENEAUX: Exhibit number 8, the release, and the notice is Exhibit Number 10.

THE COURT: Is that contained in anybody else's exhibits? I don't seem—

MR. SMITH: Yes, your Honor. The notice is in our original motion. You will find it as Exhibit B.

MR. MAGAZINER: Are you looking for the notice or the release?

[43] THE COURT: No, no, the release.

MR. SMITH: The release, I have an extra copy if you would like, your Honor.

THE COURT: Okay. I have got your papers, but I can't find it.

MR. SMITH: The release is also here, your Honor.

MR. SHRAGER: Are you giving the Court the legal notice as well?

MR. SMITH: Yes. These are—this is a full set of our original motion with the exhibits, your Honor. The release is here as Exhibit D, and the notice is here as Exhibit B.

THE COURT: Thank you.

MR. SMITH: That is an extra.

THE COURT: Now, I think that this might be a good time for us to break for lunch. It is 5 after 1:00.

Let's reconvene at 2:00 o'clock. Okay. Will that give you time for lunch?

MR. ARCENEAUX: Thank you, your Honor.

MR. MAGAZINER: Your Honor, since many of us will have to change planes, do you expect to go until 5:00 o'clock or later?

THE COURT: I will go however long is necessary. Well, I have got lots of other things I had hoped to do today, frankly. But this has priority.

MR. MAGAZINER: Why don't we assume you will go to the [44] end of the day.

THE COURT: Assume that, but I am going to try to leave myself some portion of the day for other matters.

MR. ARCENEAUX: But after I have heard from Mr. Arceneaux and Mr. Spece, then I want to ask the fractionators and class counsel for their responses.

So I would assume, if we reconvene at 2:00 o'clock, I hope we can finish by 4:00.

MR. ARCENEAUX: Thank you.

THE COURT: I hope we can finish by 4:00.

MR. ARCENEAUX: I will try to be as brief as possible.

(The trial was adjourned until 2:00 p.m. of this same day and date.)

* * * *

[48] (The following proceedings were had in open court:)

THE COURT: Please be seated.

All right, Mr. Arceneaux, let's take up where we left off.

MR. ARCENEAUX: If I may for just one brief moment, to take a step back for a second.

THE COURT: Sure.

MR. ARCENEAUX: Professor Hazard had to leave for a rules committee meeting.

THE COURT: I didn't even know he was here. Was he here this morning?

MR. ARCENEAUX: He was sitting in the back.

THE COURT: I would have said hello if I had seen him. I heard you mention his name, but I didn't realize he was here.

MR. ARCENEAUX: He had intended to address some of these questions. Unfortunately—maybe if there is additional briefing, he might be able to do so. But he did discuss with me at lunch that perhaps I had not made our position clear on one matter. So I would like to do that, to see if I can make the record very clear because I think it probably is of consequence.

In response to your Court's question about whether Mull was waiving claims against the $40 million, I think it is perhaps best appropriate to describe our position with regard to that twofold.

[49] One, we have claimed against the defendants, which is payable out of the fund, and your Honor can order the defendants to pay that claim out of the fund because the fund is a res under the jurisdiction of the Court.

THE COURT: Now you say you have a claim, though. But I want to know the basis of that.

MR. ARCENEAUX: The basis of the claim is what I explained with regard to contractual claim, the stipulation pour autri theory and the tort, et cetera.

THE COURT: But you are not saying to me, Judge Grady, your order of May 8 says that attorneys who rendered services on behalf of class members are entitled to be compensated out of this $40 million fund, and we are invoking that provision to claim fees from that fund.

MR. ARCENEAUX: The issue that was raised by the defendants was whether we were entitled to claim money in excess of the fund.

THE COURT: No, I am not asking you what they are saying. I am asking you what you are saying.

MR. ARCENEAUX: My argument is we have a right to be paid. The basis of our claim is the contracts with our clients and the effect of those contracts under both Illinois and Louisiana law.

THE COURT: Is the answer to my question no?

MR. ARCENEAUX: I am not sure. I think we are not—[50] I need to explain the second part of the argument and I think that addresses the question in toto.

There are really two issues. One is we have a claim against the defendants. The claim is payable out of the 40 million or otherwise. Your Honor has jurisdiction to adjudicate that claim as relates to the 40 million because it is a res in the control of the Court. Your Honor doesn't have jurisdiction to adjudicate that claim outside of the $40 million, and that is all predicated upon there being no settlement class.

If we are wrong about there being no settlement class, of course, there is a $40 million fund and we don't waive our right to participate in the fund, which right may be based either on contracts, which your Honor then admittedly would have more power to adjudicate and perhaps even abrogate in toto, assuming that the fees were to be proved unreasonable.

I am still not sure I am being as clear as I perhaps should be, but I think that is the best I can do.

THE COURT: Your claim under the order of May 8, to the extent you assert one, is strictly a fallback position in the event I disagree with you that there is no longer any settlement pending before this Court on a class basis.

MR. ARCENEAUX: Yes. It is an alternative claim. Does that—

THE COURT: All right, okay.

[51] MR. ARCENEAUX: When we discussed this at lunch, Professor Spece has a slightly—some nuances to

add to it, and I think it might be appropriate if you heard, just so that we can make—

If there are any distinctions, I think it would be appropriate.

THE COURT: I am not going to hear from everybody under the sun this afternoon. I don't have time to do that.

MR. SPECE: Your Honor, I have some very different—

THE COURT: I am going to hear from you, Mr. Spece, because you are a claimant here, but I am not going to hear from every kibitzer who might have flown in here today. I just don't have the time. With all due respect to anybody who is interested in the proceeding, I just don't have the time.

MR. SPECE: Your Honor, could I then at this point illuminate my theories?

THE COURT: No, because I am going to hear from Mr. Arceneaux. I am going to give him about another 10 minutes or so. Then I am going to hear from you at length, Mr. Spece.

MR. SPECE: All right.

THE COURT: Or whatever length is necessary for you to add to anything that Mr. Arceneaux has said. Okay.

MR. ARCENEAUX: I believe where we left off was you were asking me for differences between the release—

THE COURT: Prejudice.

[52] MR. ARCENEAUX: Only the ones that involve prejudice to the client.

THE COURT: Prejudice.

MR. ARCENEAUX: I had started with the first observation being the scope of what in effect was released.

I went back at lunch and studied the notice again just to make sure I had not missed anything, and the only thing that came to mind or that popped out at me was,

in the definition of the settlement class, it defines class members as those persons with HIV or who also contracted hepatitis or any other infection. But it still doesn't change my view just because they are defined as a settlement class member that the settlement effects a release.

I also notice under page 3 of the release—no, I am sorry—page 4 under "rights and options A," it says this will end all of your claims against the fractionators concerning any alleged contamination of factor concentrate.

Arguably, I guess, under a construction, that would include all claims for all sources of contamination. But I continue to believe, after discussing this with numerous clients who were outraged that the release expressly referred to HIV and other viruses, that this was not what was understood by many people who viewed this notice.

And, of course, I will remind your Honor of the rule that notices are one of the things that are subject to the most [53] strict type of construction there is under law. So many people—I couldn't go so far as to say most—but many and the ones I have consulted with did not view the notice as calling for settlement of any claimants with HIV infection.

Another prejudice to clients under the notice and/or the settlement vis a vis the release is the question of indemnity. The settlement agreement says that it is the intention of the parties to do everything possible to protect the defendants against third party claims.

The release itself specifies that if the defendants are sued by a third party, that—and in the event that the releasor recovers and the releasor—the third party has a claim against the releasor, then the recovery of the original releasor is reduced to the extent of that third party claim.

So, in effect, it is indemnity, which is not included in the original settlement proposal. I think that is a signifi-

cant prejudice for those people who were choosing to pursue third party claims.

THE COURT: I am sorry. I am not sure I followed that. Will you do that again?

MR. ARCENEAUX: Okay. Perhaps if I referred you to chapter and verse, it might be—

THE COURT: Okay.

MR. ARCENEAUX: Exhibit 9 of our papers is the settlement agreement, and number N in Exhibit 9, which is on [54] page 40, is the provision on contribution, and it says the parties intend the fractionators obtain total and final peace, and it goes on to say they intend to exercise their best efforts to obviate the necessity and expense of the fractionators appearing and defending.

The release, rather than simply saying we intend that this work out, expressly imposes on the releasors an indemnity obligation; that in the event that the fractionators are sued by a third party under a third party claim and are found liable, the releasor's recovery is reduced by the extent of that third party liability.

So even though the release purports to reserve all claims against third parties to the released parties, it in reality doesn't because if they sue a third party and the third party sues the fractionators, the hundred thousand dollars must be used to satisfy an indemnity obligation.

THE COURT: Now, how many of these releasors are suing third parties?

MR. ARCENEAUX: As far as—

THE COURT: How many of the releasors

MR. ARCENEAUX: Mull & Mull, we have the original plaintiffs who filed suit in Louisiana state court of which I think seven accepted the settlement, and they all have third party claims pending against Tulane University Medical Center. So all of the original seven Louisiana plaintiff Louisiana [55] state court cases would be subject to that.

THE COURT: What is the basis of their suit against Tulane University?

MR. ARCENEAUX: Medical malpractice.

THE COURT: Is that where they got their concentrate?

MR. ARCENEAUX: Critical care center at Tulane.

THE COURT: What is the status of those?

MR. ARCENEAUX: I do here comment that Tulane has not third partied the fractionators, and that is true. Tulane has not third partied the fractionators.

THE COURT: There has been no judgment entered against Tulane.

MR. ARCENEAUX: No.

THE COURT: What is the status of the case against Tulane?

MR. ARCENEAUX: The seven cases pending in Louisiana state court in Judge Tobias' Court, the civil district court of New Orleans, he set the first trial for November of this year. Tulane had pending motions to be released on statute of limitations. I think he is going to hear those in—is it July?

MR. MAGAZINER: Your Honor, I think we may be off on a little bit of a tangent. These are opt-out cases that Mr. Arceneaux is describing.

MR. ARCENEAUX: There are seven opt-in cases. [56] MR. MAGAZINER: You are describing cases that Judge Tobias has set for trial, and the cases Judge Tobias has set for trial are—

THE COURT: Obviously are not opt-in cases.

MR. MAGAZINER: I think we can refine this a little better.

THE COURT: Except that they could be set for trial against Tulane.

MR. ARCENEAUX: And will be if there is no exception of prescription resolved in July.

MR. MAGAZINER: There are cases pending only against Tulane now?

MR. ARCENEAUX: They are cases pending against Tulane and the defendants which are still extant because the releases have not been approved. There is no judgment of dismissal, and exception of prescription was filed by Tulane, I believe July is the date. I could be wrong about that.

If Tulane is not dismissed, the case will proceed to trial against Tulane even if the defendants are dismissed, but Tulane has not filed a third party claim against the defendants. I believe I have correctly summarized that.

THE COURT: All right.

MR. MULL: Yes.

THE COURT: Now, how many Mull clients are there all together?

[57] MR. ARCENEAUX: The opt-ins?

THE COURT: Right.

MR. ARCENEAUX: There are 318.

THE COURT: So out of 318 there are seven who have third party claims.

MR. ARCENEAUX: The remaining cases, none have sued third parties.

THE COURT: Now, —

MR. MULL: If you include the NHF as a third party or if you include the Red Cross as a third party, there are other lawsuits.

MR. ARCENEAUX: That is correct. I am sorry. I forgot about that.

Can you tell me any more?

MR. MULL: There are 130 people that have opted out.

MR. ARCENEAUX: Opt-ins.

MR. MULL: I don't know.

MR. ARCENEAUX: I can supply that to your Honor.

THE COURT: No, I just want round numbers.

So there are 130 additional people with claims against opt-ins with claims against—

MS. GOURLEY: No.

MR. ARCENEAUX: No, no.

MR. MAGAZINER: Those are opt-outs that Mr. Mull is describing.

[58] THE COURT: Opt-outs I don't want to hear about.

MR. ARCENEAUX: There were 318 opt-ins. There were—there are seven of those that were—they are Louisiana plaintiffs. They were the original suits. Those all have third party claims against Tulane.

Of the remainder, those are all pending in Louisiana state court in a couple of different forums. Some of them have asserted claims against the NIH. Some of them have asserted claims against the state of Louisiana for Angola prison plasma, I believe 120 at least.

MS. GOURLEY: Opt-outs.

MR. MULL: Those are opt-outs.

MR. MAGAZINER: Those are opt-outs.

MR. ARCENEAUX: There are some opt-ins that you may not know about, but they are there—

THE COURT: Well, could the fractionators be liable for prison plasma obtained directly from—

Who would have been the supplier of the—

MR. ARCENEAUX: They contracted with Angola state prison to buy the plasma.

THE COURT: I see, okay.

MR. ARCENEAUX: I wish I could give your Honor numbers. I can supply—

THE COURT: My question really doesn't depend on numbers.

[59] My question is this. Assuming an opt-in releasor who has and intends to have no third party claim, has there been any prejudice there?

MR. ARCENEAUX: No. If they don't sue a third party, there is no prejudice.

THE COURT: All right, go ahead.

MR. ARCENEAUX: The next one would be indemnity. I am sorry—subrogation.

The original settlement offer under my reading makes very clear that it is the fractionator's obligation to resolve the subrogation problem. The release in two ways shifts that burden onto the settling parties.

THE COURT: Let me ask you to address this, and it is based on my recollection. We were, of course, concerned with the major subrogors, the Medicare—Medicaid people and the insurance companies. I can recall quite distinctly having discussions here in open Court, or maybe it was on a telephone conference, about the fact that there would be corner drugstores and physicians and all kinds of people as to whom it would simply not be feasible to try to get releases of any subrogation claims, and I think that what we decided was that would simply have to be the class member's responsibility to deal with as it might arise.

MR. SMITH: Your Honor, you addressed that at the November 25 fairness hearing.

[60] THE COURT: What did I say, Mr. Smith?

MR. SMITH: You said exactly what you just said now.

THE COURT: All right. Now, I thought I would bring that to your attention, Mr. Arceneaux, so you can address it.

MR. ARCENEAUX: I apologize for not being aware of those discussions.

What I am aware of is the provisions of the notice which say the settlement is conditioned on resolving issues relating to reimbursement and subrogation claims that might possibly be asserted.

THE COURT: All right, to resolving issues.

MR. ARCENEAUX: But the fair construction of that for the claimant reading this notice is that if the issue is not resolved, there is no offer. So I am not going to have to pay it. That is the way that the—

THE COURT: Well, I suppose that interpretation is consistent with your position, but I am not sure I see it is justified.

MR. ARCENEAUX: Another—well, there is another way, I believe, and I just may finish this, on the question of subrogation, that the agreement shifts the responsibility of subrogation although most of the subrogation claims have been resolved. Efforts were done to do that successfully.

There are some pending, but even for those that were resolved, part of the cost of that was shifted to the releasors [61] by the provision in the release that waives liability for the United States and any political subdivision, which apparently was part of the price of buying a waiver from the United States government.

But it seems to me that that was a price that the defendants should have had to pay either in additional cash, or somehow making the releasors waive that claim does not seem to me to be contemplated by the settlement, nor is it anywhere contained within the notice.

Then there is the issue of actual dollars that some people may receive, and I alluded to this before. The original settlement agreement in paragraph F-5 makes it very clear that in the situation I described, where you had a claimant group with some people who opted in and other people who did nothing, that in the event that the class was certified and your Honor entered a bar order, as he did, that the person who opted in would receive the whole hundred thousand dollars. That is paragraph 5 under F.

The release is completely different. I have two cases personally that I know of, and I have heard of many others, one of which I believe class counsel knows about because he consulted with him as well, where there were members of a claimant group who opted in and other members who did nothing. The defendants were requiring signatures from the people who did nothing, which means that the money has to be split among [62] people and sharing in people who did not opt in.

And we have asked for a waiver at least as to the client I represent and have not been able to receive it, and I understand Mr.—class counsel asked for a waiver on behalf of the other case, and I understand he was not able to receive it either.

So in some instances, the requirement of signatures which has been described to me by one of the defendants as the suspenders in the belt and suspenders they say they are able to wear actually impinges by reducing the amount that otherwise, if it was an extant class, people would be entitled to receive as a consequence of the bar order.

There are other minor distinctions, but I think those are probably the major ones.

THE COURT: Now, to the extent that you represent people of that kind, have you given any consideration to coming before me and asking for relief because I will tell you right now, unless there is a very good reason for somebody who has not been interested enough to opt in to share in the settlement, I would want to know why such a person should receive a share?

MR. ARCENEAUX: Why they should receive a share?

THE COURT: This goes to the question of prejudice. It seems to me that I am a full-time employee of the federal government here available for—

[63] MR. ARCENEAUX: I had considered—

THE COURT: —for any assistance that I can render in this thing.

MR. ARCENEAUX: I had considered it, and while I am a little concerned about disclosing why I did not because some of it involves my own legal theories, one was that the recommendation I received from the defendants and through a client that I discussed this matter with, who had discussed it with class counsel, was your only recourse is request a waiver, which I did do.

But in my waiver letter, I clearly said we will not sign the release unless you grant the waiver because—

THE COURT: I would not permit blackmail. I will tell you that, and what you are describing is a blackmail situation. And to the extent that you have permitted that to happen to your clients, that is your fault.

MR. ARCENEAUX: Well, the other reason why I have not approached the Court is because I am not sure the Court has jurisdiction to resolve that issue.

THE COURT: I have jurisdiction over this class to the extent that there is a class.

MR. ARCENEAUX: To the extent there is a class.

THE COURT: But, of course, if you say that I lack authority to grant you help, then—

MR. ARCENEAUX: In the particular—

[64] THE COURT: —then you can lift yourself by those bootstraps to the top of this building.

MR. ARCENEAUX: In my particular case, it is not a problem, your Honor, because my client wants to sue the defendants. So failure to get a waiver on her behalf is actually not going to be an issue. I don't know about other people. The client I refer to is not interested in—

She requested a waiver, it was denied, and she has made alternative decisions.

I believe those outline the salient points of prejudice.

THE COURT: Al right, thank you.

MR. SPECE: I can address it.

THE COURT: Yes, sir?

MR. SPECE: Do you have further questions for Mr. Arceneaux?

THE COURT: Yes. I want to run through these points with Mr. Arceneaux, and then I will get to you.

THE COURT: Let me ask the fractionators how many checks have been sent out.

Out of the 6,000 that—

MR. SMITH: Your Honor, as of the end of the year, approximately 17,500 have been sent—1,700—I am sorry —1,750 have been sent out. I suspect knowing what was sent to MetLife, since then I would suspect by the end of this week, we [65] will be about 1,900.

THE COURT: Okay.

MS. GOURLEY: There is a more current report, Jeff.

THE COURT: That is close enough. I just wanted round numbers.

MS. GOURLEY: It is approximately 2,000, your Honor.

THE COURT: Let me ask this, Mr. Arceneaux. Approximately two-thirds of the money has not yet been disbursed.

Is it your position that notwithstanding what you say is the destruction of the class settlement by reason of Amchem and other circumstances that you have mentioned, the fractionators would have no basis to ask me to terminate further payments from the funds that have been deposited for payment?

MR. ARCENEAUX: They would perhaps have a basis, but I can tell you—I think what your response should be.

You have the fund under your jurisdiction, and you can preserve it because there are irrevocable offers pending, that if the fractionators retreat from after being accepted, those claimants have an absolute right to prosecute in state court where their cases are pending, or if they had no cases pending, to file a suit in state court, to recover that money.

And your Honor can enter an order saying upon presentation of a judgment from a state court or any other [66] Court saying there is a completed settlement, the money will be released. You have control over that res, and you can preserve it so that those settlements, when confected, will be ultimately concluded.

THE COURT: You think that the correct ruling on such a motion, should one be presented, is that the motion should be denied, and I should require that the payments continue to be made to the claimants.

MR. ARCENEAUX: Yes.

THE COURT: Now, this is notwithstanding the fact that the fractionators in your view have essentially lost the benefit of their bargain in the class settlement; namely, they lost the release that they though they had obtained against liability to any class members who have neither opted in nor out, and they have lost their immunity from liability for attorneys' fees beyond the $40 million in the fund.

So as you see the fractionators' picture, it is a disaster for them, isn't it?

MR. ARCENEAUX: On August 15th—

THE COURT: No, don't tell me about August 15th.

MR. ARCENEAUX: I am not going to argue about it. I think—

THE COURT: Tell me about January 7th.

MR. ARCENEAUX: I think they made a very unwise decision when they were notified on August 15th of this

Amchem [67] problem, that they decided to go forward with the settlement and deposit that money on the 29th, which indicates their acceptance of the risk that they may be exposed to those claimants who did not opt in or opt out.

They elected to proceed, and it was a strategy that they made after being fully made—fully informed of the Amchem problem, and our intention to assert this lien issue including its Amchem underpinnings; they went ahead with this and deposited the money.

Having done that, they have made 6.000 irrevocable offers, and the consequences of that which may be a disaster for them or may be manageable—I am not sure—are a risk that they must bear. The release itself says no error of law will void this release.

THE COURT: No person who has opted into the settlement has moved to set it aside on the basis of Amchem. On what basis would I hold that the settlement is invalid under Amchem, which I have read the same as you have? On what basis would I do that?

MR. ARCENEAUX: Well, just to set the record straight, there were people who complained, but they dropped their complaint when they were allowed to opt out, but they are not before the Court.

The basis of my complaint is that under well established constitutional law, and the Supreme Court [68] jurisprudence, and the Seventh Circuit jurisprudence interpreting, particularly the Kamilewicz case, any infirmity in jurisdiction or in due process is—renders a judgment void and can be raised in any proceeding even in a collateral matter when the existence of that judgment is asserted to deprive someone of a right.

Amchem—I am sorry.

The settlement order is being raised in this proceeding to deprive my clients of a right. They have a right to

attack it collaterally in order to defend their right to receive their fees.

THE COURT: Mr. Mull is going to be contending, I take it, that he did a great deal of adversarial type work connected with these MDL cases, isn't he?

MR. ARCENEAUX: He has submitted hours. I don't know how many.

THE COURT: And all of that preceded the settlement, didn't it?

MR. ARCENEAUX: There were class—there were hours that were after the settlement. He worked extensively on the medical needs trust. But as far as litigation hours,—

THE COURT: This was a hotly contested litigation, wasn't it, before the seven—

MR. ARCENEAUX: Yes.

THE COURT: Such that the fractionators thought it [69] appropriate to deposit as much as $40 million to compensate plaintiffs' counsel for work necessarily and reasonably done in connection with the litigation, very little of which would have to do with processing of the settlement, correct?

MR. ARCENEAUX: I have a different take on why they did that. I mean, I can offer you my theory.

THE COURT: You are not saying it is too much money, are you?

MR. ARCENEAUX: That the 40 million is too much? No, it is too little.

THE COURT: Why is it too little?

MR. ARCENEAUX: I think that they offered the 40 million because it was enough to make it impossible for class counsel or anyone else to launch a serious objection without sounding greedy. If they could have offered less and gotten away with it, I think they would have. But I think they picked that figure because it sounded to the

community like a whole lot of money, and if anybody had said—

THE COURT: Let me cut that off because that is really a different subject.

MR. ARCENEAUX: But I think, your Honor, that gets to—

THE COURT: Let me ask this. Let me ask this.

In light of the events that preceded the unexpected settlement in this case, do you think that the facts of Amchem, [70] with which I assume you are familiar because you cite the case so often, are distinguishable from this one in terms of whether this class settlement can be upheld?

MR. ARCENEAUX: I think the facts of the Amchem settlement and this settlement are distinguishable.

I think under the paradigm of controlling law announced by the Supreme Court, this case is worse than the Amchem settlement. It has more infirmity and is subject to greater constitutional effects.

THE COURT: Give me just two examples of that.

MR. ARCENEAUX: Two examples are the lack of commonality between these class members which the Seventh Circuit had already adjudicated, which was certainly not the case in Amchem. And that was the first branch of what John Coffey has called the two legs of Amchem, the lack of commonality and the lack of adequate representation.

I think this case fails commonality more than the Amchem class did given the Seventh Circuit ruling, which I didn't agree with, but given its existence, it seems like we have to take it for a given.

Number two, the inadequacy of representation, which is what Mr. Coffey calls a second leg of Amchem. To me, and I am loathe to—it is unconscionable that this settlement provided that these class members could ask

the Steering Committee for advice as to whether to accept this offer or not, and if they [71] did, they would not be liable for attorney fees. Yet if they consulted their own attorneys or any other attorney, they had to bear their own cost.

That equipped the Steering Committee with a method to, in effect, ensure that most people would be relying on the Steering Committee's advice.

THE COURT: It also avoided unnecessary attorney fees, which is the reason I approved that aspect of it.

MR. ARCENEAUX: I don't believe they were unnecessary attorneys' fees because of the commonality problem. In the original June 4th hearing when this issue was discussed, your Honor went on record, and correctly so, being very concerned that no position be taken by the Steering Committee as to any particular case because the facts were too much in dispute. And class counsel agreed with that position and said: I think all we can say is consult your own attorney.

Then when you look at the release, the release says we have approved the settlement and we think it is fair. And then in the next paragraph it says but there are many facts in dispute. You may do better in your own case, you may not do better, we can't tell you. And then in a third place in the notice, it says you don't need an attorney to fill this out.

Now, to me all that in toto means there were many people who signed this notice relying upon the assessment by somebody that it was the best that could be done. It was a [72] good deal as to their case. It may have been the best that could have been done for the whole community, but as to any one particular person, and in some respects this ties commonality with adequate representation, that assurance could not be made absent an attorney

who studied the facts of that case and the law of that state where that case would be tried.

THE COURT: Did those aspects of the matter have any bearing on any of Mr. Mull's opt-in clients?

MR. ARCENEAUX: Were Mr. Mull's opt-in clients influenced by the Steering Committee?

THE COURT: Were they prejudiced by anything that you have just mentioned? In other words, did they lack adequate advice as to whether they should opt in or out?

MR. ARCENEAUX: Every single one of them consulted with Mr. Mull, and he reviewed every case. I don't know how many of them he recommended opt in. I know there were some that opted in over his recommendation.

There were many things on the Internet undercutting his ability to advise his clients. There were repeated postings saying don't—basically don't trust your own lawyer. I am paraphrasing there, but that was the import of many of the postings. It kept talking about professional responsibility, and if in doubt, get it in writing, phrases such as that.

I can't say how many people disobeyed his advice. Some people opted in over his advice, and I don't know the [73] reason.

Dovetailing into the ability to recommend people who essentially were not common and had no commonality is the motive to do so and indeed the obligation of the Steering Committee to do so. And this is a—this is a quandary. Class counsel was in, and it is built into this. It is inherent. It is no one's—the motive is not the issue: it is the design of this, which is the defendants' fault, in my view.

Class counsel—

THE COURT: Let me ask—

MR. ARCENEAUX: May I?

THE COURT: No. I will ask my next and near final question because I want to get to Mr. Spece.

I would like your response to this question which troubles me in regard to your entire position. Without the limitation of attorneys' fees to a separate fund, there would have been no settlement here. The only settlement that I was ever asked to approve and the only one I ever indicated I would give any consideration to approving was a settlement that would yield $100,000 net of attorneys' fees to each class member.

Now, Mr. Mull and Mr. Spece sat back and watched that settlement take shape, did not appear at the fairness hearings to object, filed no written objections, and permitted the Court, counsel, and members of the class to proceed with a settlement that was premised absolutely on the proposition that [74]there would be no attorneys' fees payable in any way whatsoever except out of the $40 million separate fund.

Now, having observed that process go forward and yield a settlement that has resulted in an enormous amount of money, Mr. Mull and Mr. Spece now say we want I am not sure how much money, but we want our contingent fee contracts honored because our clients have been paid or will be paid $100,000 each.

Now, Mr. Arceneaux, you have used the words—I am not sure which words you have used, but they were synonymous with unconscionable in referring to the fractionators. Tell me why what I have just described is not unconscionable.

MR. ARCENEAUX: I have two point to make about that.

First, I think it is—to assume that there would have been no settlement absent the $40 million—

THE COURT: You are looking at the fellow who knows whether there would have been one or not, and I am telling you there would not have been.

MR .ARCENEAUX: Your Honor, that is an assessment of the chancellor's foot kind that Amchem says you shouldn't have had to make. You were put in the most difficult position of everyone here. You were asked to assume as a given what the defendants were telling you without ever being able to know if this process had negotiated through, without the class vehicle, what the outcome would have been. The process was started, and a deal was actually—settlement documents had been [75] circulated.

But, in any event, I don't want to confine my argument to the facts because I don't think—it is not the basis of my argument. I think the important point is that you were asked to assume as a given that there would have been no settlement, and there was no one in that courtroom to challenge that assumption for you.

THE COURT: You could have done it, or not you, but Mr. Mull could have done it. Mr. Kozak could have done it. Mr. Spece could have done it. None of them did.

MR. ARCENEAUX: No, your Honor, and this is why I call this settlement unconscionable.

By releasing this settlement to the Wall Street Journal before the offer was made to individual attorneys, the community knew $100,000 had been offered. There were clients who wanted to accept that money. Mull & Mull were prohibited from—

THE COURT: I will tell you that for sure.

MR. ARCENEAUX: They could not have attacked that settlement.

THE COURT: The mail I got in favor of the settlement from members of the class was almost unanimous in favor of it, with a few very notable exceptions.

MR. ARCENEAUX: As evidenced by, I guess, the small number of opt-outs that remain. I think it is only about 300. [76] I am not sure.

But the point is Mull & Mull could not have attacked the settlement without incurring some problem with the clients that it had that wanted to opt in. So it made the conscious election relying upon federal jurisprudence, since it had not been cited, it had not been served, it had not been named as a defendant or as a class member, that if it stood by and let this class be certified, if certification became a problem for it, that at the appropriate time, it would have the absolute right under federal law to raise whatever issues it needed to raise when it was appropriate to defend its rights and its own clients' rights were no longer in jeopardy. That is the reality.

THE COURT: So you are saying that they had the intent all along, Mr. Mull had the intent all along to challenge the settlement once it had been effected?

MR. ARCENEAUX: They had the intent all along to collect their contingency fees.

Of course, we all assumed, and I extensively discussed with Mr. Mull before Amchem that it seemed inevitable to me that Amchem would be resolved the way it was, especially given the Seventh Circuit's approval of Judge Becker's rationale in the Kamilewicz case.

But, in any event—

THE COURT: Mr. Mull felt no obligation to advise the [77] Court, for instance, if no one else, that he was not amenable to what the Court clearly thought was an indispensable part of an agreement that fees would be limited to the 40 million fund?

MR. ARCENEAUX: He couldn't. If he could have done that, he would not have been serving the interests of his clients that wanted to accept the settlement.

THE COURT: Except that these issues go to the fairness of the settlement. He had an obligation to his clients to raise each and every objection to the fairness of the settlement, and what we have been talking about here is whether the settlement was fair.

MR. ARCENEAUX: They go to the fairness vis a vis the attorneys but not as to the clients.

THE COURT: Except that what you have been talking about in terms of Amchem here for the last 15 minutes all goes to the question of whether the settlement was fair to the clients.

MR. ARCENEAUX: They go to the issue of whether or not the Court could be assured, given the lack of commonality and adequate representation, that the settlement was fair as to any one particular person.

As to many people, there are those who could say, and in some cases I may even say, although I have not seen those cases, that as to any particular person, it may have been fair.

The way this thing was designed, it was to silence [78] dissent. No one was in a position where they could come forward and realistically oppose this settlement.

THE COURT: This is about the most cynical description I have heard in a long time of the legal profession. I will grant you that a lot of the criticism we get is warranted, but what you are saying here is that for the past year or so, what we have been doing is engaging in a process that all the lawyers involved in knew was wrong, and they were doing it to line their pockets.

MR. ARCENEAUX: I don't know about all the lawyers. I know from my perspective when I became involved—

THE COURT: All the knowledgeable lawyers, which I assume they all are.

MR. ARCENEAUX: I am not going to say that other people were not knowledgable. I am only going to speak for myself and my client.

From my perspective, the minute Amchem came down, we began to shout from the rooftops that this was fatal, that there was a serious problem.

THE COURT: Except you knew—you say you knew how it was going to come out, and I will grant you that handwriting was not entirely—was not entirely illegible. Why didn't you start shouting long before the decision?

MR. ARCENEAUX: Because until the decision did come down, people weren't listening to us. They were saying—

[79] THE COURT: Let me interrupt for just a minute. Are the people here on the TRO?

Call that case.

(Brief interruption.)

THE COURT: Thank you, counsel, for abiding the interruption here.

Have you ever heard of equitable estoppel?

MR. ARCENEAUX: Equitable estoppel, absolutely.

THE COURT: Do they have that in Louisiana?

MR. ARCENEAUX: We don't in fact. We call it something different, but the principle is the same.

THE COURT: The principle is the same.

MR. ARCENEAUX: The U.S. Supreme Court has said—

THE COURT: Does that seem to you to have any possible relevance to this situation?

MR. ARCENEAUX: Absolutely not, your Honor, and I will tell you why. There are three reasons.

One, because the U.S. Supreme Court says knowledge of a proceeding—if you know about it, if you sit in the courtroom and you are not cited, served and named, you have no obligation to intervene, you have no obliga-

tion to speak up. That is number one, and that is the big reason.

Number two. In this particular circumstance, these attorneys could not serve their clients who wanted this hundred thousand dollars and object. They absolutely could not do it. [80] That is reason number two.

And reason number three: In every way that it was possible for them to reasonably object and shout, although their shouts could only be timid, but in ways that they could shout to make this issue known, we tried to make it known. And the fact that people were not listening to us until now doesn't mean we have provoked this crisis.

It means only now is when our position, which was asserted as early as July of 1997, when I filed in Louisiana state court the DS class action and sent the defendants a letter saying: You have got a problem. Your federal class is in serious doubt. Louisiana statutes specifically allow settlement classes. Move your settlement down here, and you can do your deal in a way it can never be challenged. They ignored that request and went forward in federal court.

Then again on August 15th, 1997, when Tom Mull wrote to them and said you have got a problem. You are dead in the water under Amchem. What are you going to do? And 15 days later, they deposit this money.

If there is an inequity here, it is because they chose to ignore the warning signs and now have committed themselves to a course which will happily benefit the community by guaranteeing to those 6,000 people who want their money, their hundred thousand dollars, and will probably allow those people who did not accept that offer or those who choose not to sign [81] that release to look elsewhere for their recovery, but which also has the effect of leaving this up to state law in the matter of attorneys' fees.

THE COURT: Thank you, Mr. Arceneaux.

MR. ARCENEAUX: Thank you, your Honor.

THE COURT: Mr. Spece, let me hear from you on additional points. I will assume that unless you specifically say otherwise, you join in everything that Mr. Arceneaux says.

MR. ARCENEAUX: I would like to add.

THE COURT: Unless you want me not to. But I don't want you to repeat what he said. That is the point.

MR. ARCENEAUX: To the exhibits that are attached to my memorandum, I would like to add one more.

THE COURT: Sure.

MR. ARCENEAUX: This one illustrates, I believe, unfortunately, the extent of the conflict of interest that class counsel has found itself under.

THE COURT: Give it to me.

MR. ARCENEAUX: It is a letter to me dated November 20.

THE COURT: Hand it over here. The reporter is doing other things.

What do we call this?

MR. ARCENEAUX: It will be number 21, I believe.

MR. SPECE: Your Honor, I want to address something [82] that I think has been lost, and that is—there has been talk about additional briefing.

The way this arose was a motion by the defendants to ask you to change your mind as to your statements in a prior Court proceeding in which you said the Arizona plaintiffs should be paid regardless of the legal theories that are being asserted by their attorneys.

You said earlier today you would not countenance blackmail. Well, if that isn't blackmail, I don't know what is, what they are saying is.

Not only that, we will go ahead and pay Mull & Mull's clients, but we are not going to pay Rose Ibanez and Roy Spece. I submit the reason that is is because I think we

are smaller, we have far fewer clients, we have fewer resources. The idea was let's pick on the little guys, and then it will be a precedent.

And I would urge your Honor to order today, because daily the damages are accruing and the wedge is drawn deeper between our clients and ourselves because their moneys are being held up and they are being told by Mr. Higgins it is because we have asserted a lien.

We are not asserting a lien against the moneys to the client. We made that very clear. Indeed, the defendants asked your Honor to make an order and then withdrew it, arguing that you had already made this clear that the Arizona clients should [83] be paid. That is how the ball got rolling, and then there were subsequent motions.

I would ask your Honor to rule today because we have told our clients that we will be coming in here and that you would likely opine on that issue.

THE COURT: Let me explain the reason for the delay. While you are quite correct concerning what I said, I hadn't bargained on the continued existence of this controversy among all of you as to whether the fractionators faced a possible additional liability beyond that that is specified in the class settlement. And I think it would be unreasonable to require them to go ahead and pay class members and then face further financial liability based on those payments.

That is why I wanted to hold this hearing today, and that is why I want to get this thing decided, so that the fractionators will know, at least as far as I am concerned, whether they are or are not subject to the possibility of such further liability.

But until I have entered such an order, I don't think it has been unreasonable for them to hold up on payments to the—to your clients. As I understand it, they have not held up on payments to the Mull clients.

But, anyway, go ahead.

MR. SPECE: I hope your Honor does not link the issues of the legal arguments that the attorneys make as to their fees [84] to the payment of the clients. We contend those are two separate issues.

Now, let me start with the last question that you asked Mr. Mull. You said: Well, shouldn't there be equitable estoppel? These people sat back and allowed these proceedings to go forward.

I participated in settlement negotiations. Mr. Shrager and several other members of the Steering Committee and some friends of the committee were present, and I remember distinctly Mr. Shrager saying the offer by the defendants is unethical, it is a conflict of interest, the fees are way too low, and they cannot stipulate to the $40 million fund.

He realized the conflict of interest, but he resolved it in favor of the clients because they had exploited a situation. As Mr. Arceneaux has stated, they made an offer to the community that forced the lawyers to accept an agreement which provided for inadequate fees from the get-go.

THE COURT: Mr. Spece, I don't understand why you did not consider it your obligation to the Court who, after all, had a duty under the law to make a finding as to whether this settlement was fair—

MR. SPECE: Your Honor, we did.

THE COURT: —to inform the Court that you—

MR. SPECE: Rose Ibanez and Roy Spece did.

THE COURT: —thought it was an unfair settlement.

[85] MR. SPECE: Roy Spece and Rose Ibanez did.

THE COURT: When?

MR. SPECE: We filed—before the settlement hearing, we said that there was a conflict of interest. The fees were inadequate, and it was improper, but we would

waive the objection on the assumption and to the benefit of our clients that this Court would make an equitable distribution of attorneys' fees and considering the contingent fees and the effort of all concerned.

THE COURT: You have difficulty—

MR. SPECE: We brought that to the attention of this Court.

THE COURT: You have difficulty thinking of the interests of your client as distinguished from your own pecuniary interest. When I refer to the question of whether this is a fair settlement, I mean whether it is fair to your clients.

Now, I don't specifically recall your complaining about the fees, but—

MR. SPECE: Your Honor,—

THE COURT: —it is unlikely that I would have thought $40 million was inadequate to cover all possible reasonable fees here.

But did you ever call to my attention?

MR. SPECE: Yes, your Honor. We argued that $40 [86] million was inadequate. Mr. Shrager—

THE COURT: Will you listen, please?

MR. SPECE: Yes.

THE COURT: Did you ever call to my attention any unfairness to the clients that you see in this settlement?

MR. SPECE: Your Honor, I don't think you can divorce the clients from the attorneys because, as you pointed out, if the MDL attorneys aren't paid, will future victims be represented by people? Will future consumers be represented? This is a systemic problem.

This sole focus on the client, this is litigation. This involves the clients and the attorneys, and attorneys will not represent consumers and clients unless they are paid. And many of these clients want their attorneys to be paid. And if they thought their attorneys were going to get an

inadequate compensation, they might not have participated.

But I am just telling you we brought it to this Court's attention. We said we would not raise this, but that was before subsequent developments which showed—suggested that the defendants never intended to have a legitimate class action.

And as to that, we have asked you to take jurisdiction because we wanted to bring it to you in light of subsequent developments if you are willing to give us discovery and have an evidentiary hearing on our issue. We have said in our [87] pleadings we—you have jurisdiction over the res, but we will submit ourselves to the personal jurisdiction of the Court. We want this Court to litigate this. We want this Court to give us discovery. We want this Court to make a decision because we think this is a knowledgeable Court and a fair Court.

Now, that—

THE COURT: Let me ask you this. You think that the minimum fee you should get as to any of your clients is the amount of your percentage fee, whatever that is, is that correct?

MR. SPECE: Let me then go into my theories which would say how much we feel that we are entitled to.

THE COURT: Okay.

MR. SPECE: Now, one question you asked, is there liability arising from the May 8th, 1997, order. I say yes on several theories.

One, if there still is a class, then we submit that we can make a claim on the fund based on the reasonable value of our services.

THE COURT: There is no question about that.

MR. SPECE: We should not be forced to waive our argument by business coercion or blackmail or coercion by saying—and give up every other legal theory that you

have, including a theory for defamation perpetuated by these defendants, as we have brought to your attention in the [88] Mr. Murphy case and the letters that occurred from that.

But from the—

Your Honor had an obligation. We had an obligation. Both sides of the litigation had an obligation to this class or these—or this community when the offer went out pursuant to your order. And that offer must be construed by what would reasonbly be expected by the offerees, which were both the clients and the attorneys or the clients and the attorneys as third party beneficiaries.

And what was that offer? The offer was you will get $100,000 net, and the attorneys will be paid a reasonable value for their services considering the existence of contracts as well as the value of the services everybody contributed to the effort.

THE COURT: Now, where did the notice or anything else say considering the existence of contracts?

MR. SPECE: Your Honor, this is where the defendants weren't going into this blind. We have talked about Amchem, but Georgine existed from the get-go here. The defendants knew very well that they were taking a substantial risk, and certainly this Court could not have intended that they would send out a notice pursuant to his order, and then if Georgine came down, they could back out, when the notice itself that was sent after approval said nothing. It said there were certain contingencies, but it didn't say but if Georgine comes out and [89] Anchem and gets reversed, forget the whole deal is off, and they can walk away.

No. They knew—you participated in this, and I participated in this, that when those notices went out pursuant to this May 8th order, that an offer was made and it would be construed by how a reasonable person would interpret

it, and that is out. I have ventilated what reasonable person would see, that they would get $100,000 and their attorneys would be paid a reasonable value.

THE COURT: Out of the $40 million fund. And I—

MR. SPECE: Yes, yes. Okay, that is our one theory, your Honor.

Now, I just want to tell you our other theories.

THE COURT: Okay.

MR. SPECE: Secondly, when the releases came out, everything changed. We had said we would waive our objections and submit it to the jurisdiction of this Court and seek quantum meruit or the reasonable value of our services, hoping the Court, and we urged the Court to look at the contingency contracts.

But when they changed the deal to the detriment of our clients and to our detriment and concomitantly started saying, if you opt everybody in, we will take care of you on your attorneys' fees, but if you don't, we will question every little red cent and you are probably not going to get much, [90] then we knew that either they never intended this deal to go through or they were using the auspices of this Court and the purported class action for coercion and their own benefit.

THE COURT: Now, here, let me interrupt right there. If you were told by anybody on the Steering Committee or class counsel at that point that your fees out of the fee fund would be affected by whether you induced your clients to opt into the settlement or not, that is something that should have been brought to my attention. I would regard that as misconduct.

MR. SPECE: Your Honor, I didn't say class counsel. I am saying the defendants had said this, and we did raise this in the last hearing. We told you that Mr. Berkman has been telling us this, and Mr. Shrager basically echoed what

I said, and Fran Phares is here. And she is another person to whom he has said this.

THE COURT: I can tell you that it's not going to work.

MR. SPECE: Your Honor, what we are saying is given—

THE COURT: Mr. Spece, to the extent that I end up making a determination of what a reasoanble fee for a particular attorney is in this case, it will in no way depend upon whether that attorney has advised a particular number of clients to opt into the settlement, at least from the standpoint of whether that was something the defendants wanted or not.

[91] Now, it could be that the amount of work involved for the attorney may have had something to do with whether somebody opted in, but I would think that would be a very small amount of work. And I can't imagine Mr. Berkman coming before me and saying Mr. Spece is not entitled to more than X dollars because he only opted in 20 clients.

MR. SPECE: Of course he wouldn't say it, your Honor.

What he would say is if you didn't opt in, what he thought you should have opted in, then your hours and fees will be subject to excruciating examination and detail and you will be punished that way.

But the larger theory, you Honor, is that when they made a substantial—

THE COURT: But my statement that I want to make now for your benefit and for the benefit of anybody who reviews this record in any connection is that that won't work. I have a job to do here and I am going to do it.

MR. SPECE: But, your Honor, your job is not solely to steadfastly stand by a class settlement if the defendants have deviated from the notice and indeed repudiated your

findings because their release says you do not rely on any class settlement, you do not rely on a finding by Judge Grady, you would have entered into this whether or not there ever was a class action.

What I am saying is that gives you a predicate to [92] enforce these contracts to say whatever the defendants intended from the beginning, even if they didn't have a fraudulent intent from the beginning, they have clearly undertaken a risk and now are trying to exploit it. And I am not going to lend the auspices of this Court to such inappropriate behavior. I am going to enforce the contracts; that is, people can accept the settlement.

And in this circumstance, we feel your Honor should enforce the contingent fees and shouldn't say, oh, and what about the poor fractionators; there is going to be a failure of consideration. They have inappropriately tried to use the auspices of this Court and the law of this land, and you should not countenance it, and you should not worry about them losing some benefit of the bargain. That is—that is our second theory.

Now, our third theory is the fraud theory from the get-go which we need discovery on, and, finally, affirmative misconduct, the coercive behavior by Mr. Berkman and the fractionators, who—Lory Barsdate is here—sent a letter to your Honor by a Mr. Murphy, which we feel was intended to further discredit us, to suggest that we had told a disproportionate number of our clients to opt out. We are not telling them of their chance to opt in.

Your Honor, we filed papers—

THE COURT: I remember that.

[93] MR. SPECE: We negotiated with the defendants in Arizona and told them, look, let's put this off because this client is going to opt in and we have told them. So they knew we were telling people and they knew that Mr. Murphy wasn't told because they were saying he is not

eligible because he lost on appeal. So we didn't tell him because we didn't want him to get his hopes up and then dash them against the wall, as so often happened to this community and would happen if your Honor didn't enforce these contracts regardless of what the attorneys are saying.

They knew that Mr. Murphy was not being told because he had not yet been said to be eligible by us, but they knew they were telling other people. Why did they have this sent out, nevertheless, to your Honor? Because they want to punish us. They want to punish us because we are not going along with the program.

We are saying whether there was a deal in the beginning, a legitimate intent is a big question, but there has been a substantial deviation. Your Honor shouldn't tolerate it. Your Honor shouldn't become a part of it. And they want to shut us up.

That is a serious allegation, but if your Honor takes jurisdiction over this and allows us to do discovery, we will prove to your Honor that they knew that these were completely unfounded allegations. And your Honor knows from the letters [94] that we sent, and now we can say it in open Court we gave excruciating detail and long letters every time our clients had to make a decision, and it was made known it was their decision, but we gave them all the parameters.

Okay. The next question: Could the defendants renounce the agreement? Mr. Arceneaux says not once they deposited the money. I say once they sent out the notices because, once again, the notices they knew about Georgine, they knew the risk and they had many things to gain regardless.

THE COURT: Do you mean releases or—

MR. SPECE: The notice. The notice itself says—

THE COURT: The class notice that was sent back.

MR. SPECE: That is what the people get. That is the community. That is your Honor's sanctioned communication to these people. People, here is the deal. And this is like a prospectus. It should be treated with even more sanctity than a prospectus in the securities area, which is strictly construed.

And it is saying to these people here is the deal. It says nothing about the defendants can walk away if the Supreme Court decides to affirm Georgine and Amchem.

THE COURT: So the fractionators needed to be notified as far back as when class notice went out that they were exercising or that they were engaging in a waste of time because—

[95] MR. SPECE: Not a waste of time, your Honor.

THE COURT: —to the extent that they thought they were going to limit fees to the 40 million fund, they were whistling Dixie.

MR. SPECE: First of all, they should have never done that. That was an unethical exploitation of a conflict of interest which Mr. Shrager waived only because of the benefit of his client. He said we all have to fall on our swords for the benefit of the community. But it was an unethical thing for these defendants to do, and you keep saying, oh, they have lost the benefit of this bargain, that was not a proper bargain, that was an exploitation, the kind of exploitation that Amchem says is unconscionable.

But they didn't stop there, your Honor. They knew the risk. What did they benefit from? They want these cases to go away. Why do you think they are trying to defame us and tell people that we opted too many people out when we really opted as many people—

First of all, we don't opt them out. They make the decision. You know that from the letters we have sent to you. So the defendants didn't just get a limitation of

attorneys' fees; they have gotten rid of a lot of cases, and they went directly to the clients without the advice of their attorneys. And many of those people opted in when their attorney said don't opt in. That is the benefit to these defendants, the [96] idea that they have lost all consideration.

Your Honor, if you enforce these contracts as individual settlements without giving them punitive damages, then your Honor will be doing them a big favor and they are walking away really cheap.

The next question: How did the deviations in the release from the notice hurt the defendant? Okay. They said—

THE COURT: Hurt the claimants.

MR. SPECE: Hurt the claimants.

First of all, you waive your right against the government. It didn't say that in the notice. Why does that matter? They even said in their briefs we had to pay the government 30 million. Well, that is 30 million that was owed to the community. They are telling you that this was something of value and they had to buy it. But they took it away from the community because the notice said you can still sue the government.

Now, why does that matter? Because in trying to negotiate Rickey Ray, some legislators and government bureaucrats are influenced by the idea, albeit somewhat remote, that people will sue the government and can sue the government, and I will vote for Rickey Ray because now maybe we won't get sued. That has gone bye-bye unless your Honor does what we feel is the right thing, and that is reform these releases to [97] comport with the notice, the notice that you approved, the fairness and what you found to be fair.

If you allow them to deviate like this, then they have done a bait and switch, and they have used the auspices of this Court.

What else? The lien. True, your Honor, you did say, and it is true, there will be some pharmacies and this and that, but we are talking about substantial liens. It says here the attorneys. Once again, we have theories that go beyond that.

If your Honor doesn't take jurisdiction, we will tender jurisdiction. But if your Honor finds that he doesn't have jurisdiction as to Mull's client, as to these theories of fraud, these tort theories, we intend to pursue this in another forum.

Now, what the release says is that our clients will indemnify the fractionators. So what this release is saying —what the notice said is there will be no more obligations because of attorneys' fees.

Now, what the release says is if we sue them—if Rose Ibanez and I sue them for the defamation on our character per say by making that false allegation or republishing an allegation that they knew was not true and then that is construed as attorneys' fees, they can seek indemnification from our client. That is not part of the notice but that is [98] in the release.

So those, your Honor, are the—Mr. Arceneaux mentioned some other items, but those are very significant items, and we made a motion formally before this Court to reform the releases to comport with the notice, to provide that government actions can still be brought and to abrogate this idea that they can seek indemnification by those who might seek attorneys' fees from them.

Can the fractionators back out? Now, that is what you said.

THE COURT: Excuse me just one minute. I have to get some ink for my pen. I will be right back.

(Brief interruption.)

MR. SPECE: Your Honor, shall I proceed?

THE COURT: Yes.

MR. SPECE: Can the fractionators back out now? No, because of all the theories and arguments that I made to this date, your Honor should not let them back out and walk away from those who haven't been paid.

And Mr. Arceneaux said, well, people could present state court judgments. We feel this Court has the jurisdiction to adjudicate those claims because these defendants used the auspices of this Court, got approval by this Court, sent out a notice on approval of this Court. And even if it is not a class settlement, it is certainly settlements with those [99] people. And your Honor can adjudicate it right now and they can't back out given the facts as they really are.

Can you say that the class action doesn't exist as of this date? Yes, indeed. Although Rose Ibanez and Roy Spece said we waive the objection and the settlement is not fair, our position is actually that Wadleigh v. Rhone-Poulenc is res judicata. It decided that the criteria for the class action could not be met.

Amchem says that the same criteria for a class settlement must be met—a class settlement has to be based on the same criteria as a litigation class. You could say that Walker is different, but it is not. The name is different. There's some nuances, but this is just a continuation and it is really res judicata.

And I do agree with Mr. Arceneaux that that—it is void, that it could be attacked. It is a matter of subject matter jurisdiction, and for this very reason, the defendants are not raising this against people. We had one person who could not get their lien resolved. She is proceeding with her individual case.

There were people who appealed to the Seventh Circuit, and they said, no, we will let you off the top. They are not raising this because they know it is the fact.

Well, what about then the next question? What about work that was done before the class was certified and if the [100] class is decertified? Well, your Honor can certainly, because this is a—even if it is not a class settlement, given everything that has gone down, given your Honor's participation, and the defendants invoking the auspices of this Court and then deviating from what this Court approved, certainly has jurisdiction to treat the attorneys equitably and dispense the moneys that are before the Court and then leave for another day any claims in addition to that that might exist at the end of the day before your Honor.

If there are no further questions, your Honor, that is all I have.

THE COURT: All right. Thank you, Mr. Spece.

MR. SPECE: Thank you, your Honor.

THE COURT: Mr. Arceneaux.

MR. ARCENEAUX: Just one footnote to Mr. Spece's comments because I think it is important.

He mentioned the fact that the defendants are not raising the class as a defense. I mentioned earlier the DS class action in Louisiana. There certainly would have been the opportunity there for the defendants to waltz into Louisiana Court and raise an exception of res judicata or to seek an injunction from you shutting us down, and they chose to do neither.

Instead they removed it to federal court under a questionable theory of removal, but, nonetheless, it was [101] removed. And before Judge Berrigan could remand it, still no objection of res judicata and no injunction. It has been transferred to your Honor, and so now we will be reasserting our motion to remand, and it will be interesting to see whether the defendants place before your Honor a defense of res judicata, whether they really believe in their settlement because that is the next battleground where the Amchem question will be litigated.

Thank you, your Honor.

THE COURT: Now,—

MR. MAGAZINER: Your Honor, that is just so—

THE COURT: That is also a case in which the plaintiffs claim there is no diversity, isn't that true?

MR. ARCENEAUX: The plaintiffs claim no diversity. The plaintiffs claim there is fraudulent joinder because we name as class representatives people from other states other than Louisiana. There is a diversity issue there.

There were two grounds for removal: Lack of diversity and this res judicata exception to the federal—

But they have not raised, and the point I wanted to make is they have not asserted anywhere in that proceeding that your Honor's May 8th judgment is a bar to that suit. They have only argued that the May 8th judgment gave rise to your Honor taking jurisdiction over that suit, and it will be interesting to see whether they raise before your Honor the May 8th [102] judgment and test whether or not, when a client asserts it, that judgment is binding.

Thank you, your Honor.

THE COURT: All right, thank you.

Mr. Magaziner, or whoever wants to go first.

MR. MAGAZINER: I was just going to respond on that one point, that I think, your Honor, there is so much that has been said both in the brief and during Court, maybe before the fractionators respond, if we could have two or three minutes just a caucus among ourselves about how to proceed, it might be helpful.

THE COURT: Well, here, why don't we recess until 4:00 o'clock. It is 12 minutes to 4:00. Is five minutes enough?

MR. MAGAZINER: Five minutes will be plenty for us. Will your Honor want to hear first from Mr. Shrager?

THE COURT: I don't care. I will hear whoever wants to speak on behalf of the fractionators and on behalf of the plaintiff class.

MR. SHRAGER: Fine.

MR. MAGAZINER: Thank you, your Honor. Five minutes.

(Brief recess.)

THE COURT: All right, who wants to go first?

MR. MAGAZINER: I think I have been elected to do so, your Honor.

THE COURT: Okay.

[103] MR. MAGAZINER: Yesterday we received Mr. Arceneaux's 48-page brief and 20 exhibits, including a very lengthy affidavit making all sorts of factual assertions which we believe to be false. Today many, many things were said in Court which we think range from inaccurate to blatant falsehoods.

THE COURT: Let me interrupt just a moment. This may account for some problems I was having earlier in the afternoon. I didn't get a copy of anything that Mr. Arceneaux filed yesterday. I have got all kinds of stuff that you filed.

MR. ARCENEAUX: You didn't get something that looked like this from Federal Express?

THE COURT: Let me look at them.

MR. ARCENEAUX: We sent them all Monday night by Federal Express. I packed the envelopes myself.

MS. GOURLEY: I didn't get mine either.

MR. ARCENEAUX: She didn't get hers either.

MR. SMITH: Mine arrived late in the afternoon, but they were marked for afternoon.

MR. SHRAGER: Nor did I. I got a document with a brief and exhibits. It came late in the afternoon.

MR. ARCENEAUX: The exhibits were not attached to yours. I sent the exhibits to the depository and Ms. Nast. We ran short of sets. I was late in the evening. There was nothing I could do. I apologize for that.

[104] (Brief interruption.)

THE COURT: All right.

MR. ARCENEAUX: You may keep that copy although it has got some marks.

THE COURT: You keep it. It is around here someplace. It just hasn't come through to me. I usually get it not even necessarily the day it is filed. So I will read it. I will read it before I rule on these motions, but now I understand why I didn't have the exhibits you were referring to.

Okay.

MR. MAGAZINER: What I was going to say, your Honor, is the situation is evolving very rapidly. Among the things we learned from Mr. Arceneaux's brief is that Mr. Arceneaux and Mr. Mull have apparently sued the fractionators in St. Taminy Parish in Louisiana for $15 million, or something like that, which they think is the amount of money we owe them for the contingent fees. Mr. Spece has filed some new liens as of yesterday.

What I am leading up to, your Honor, is we would like an opportunity, not very long, to submit in writing our response to some of these things that have been said and that are being done.

THE COURT: All right.

MR. MAGAZINER: And if your Honor wants to defer your ruling until you have received our response, that is fine. But [105] we would like—

THE COURT: Well, I think—

MR. MAGAZINER: —to correct the record.

THE COURT: I think I would like to read everything that has been filed.

Then if you think the best way for you to respond is in writing, that is all right because basically what I have done today is to pinpoint things that were of special interest to me that weren't necessarily dealt with in exactly those terms by the parties.

MR. MAGAZINER: If I may share our concern?

MR. SPECE: Just a point of clarification?

On the issue of paying the client in Arizona, since everybody else is being paid, do you still assert that you are not going to pay?

MR. MAGAZINER: As I understand your Honor's ruling, you have said that you believe that it is reasonable and appropriate for use to withhold payment from clients whose lawyers are telling us that every time we pay $100,000 to a client, we thereby incur an obligation to pay another $50,000 to the lawyer.

THE COURT: I do think that is reasonable, and anything I have said previously to the contrary—

MR. SPECE: Is it going to be on a selective basis?

THE COURT: —was said without adequate consideration [106] of the exposure that involves for the defendants.

Now, why have you gone ahead and paid Mull's people and not Spece's people, though, in light of your caution?

MR. MAGAZINER: I think perhaps we should not have been paying Mr. Mull's clients.

The reason was, and I am not sure we have been entirely consistent, it looked to us originally like Mr. Spece had come closer to perfecting a lien than Mr. Mull had done at that time. And we weren't sure what our rights—

None of us on the defense side have ever been in a situation like this where we are being told by a lawyer,

pay my client, he wants a deal. If you pay him, you owe me another $50,000, 50 percent more than you agreed to pay him, and we are demanding both that you pay us, pay him, and that you acknowledge having—and if you do pay him, it is a recognition of our lien.

Whether we have acted entirely consistently, I don't know. If I had been the only lawyer involved, I think I would have said to Baxter, let's not pay Mr. Mull's clients and let's not pay Mr. Spece's clients and let's have Judge Grady resolve this. But we have not been entirely consistent. We will try to be consistent from this point forward.

MR. SMITH: We will be, your Honor.

THE COURT: Now, let me ask whether you wish to address the points that I have discussed with Mr. Arceneaux and [107] Mr. Spece in writing or whether you merely wish to respond to the matters that are set forth in Mr. Aceneaux's memorandum.

MR. MAGAZINER: Your Honor, I think what we would like to do, if it would be acceptable to the Court, is wait until we have a transcript and at least we do—

We are concerned that, as your Honor adverted to, there may be some further review of this matter, and we would like the record to contain our response to some of the things that have been said about our clients and about us.

THE COURT: All right.

MR. MAGAZINER: We would like to have the transcript so that we can see what was said. So much was said, and we, I am afraid, do not have accurate notes.

As to the legal questions that your Honor asked, we would be happy to respond to them in writing if you would like us to. I and my colleagues would be happy to answer any questions that you have of us right now, if that would be helpful to the Court. We want to do whatever is most helpful.

I think some of the questions are questions which we probably don't need to answer at all. We do believe there is a valid class settlement. We do believe that that settlement survived the Amchem decision. We think that settlement is extant. So those are some answers to the most fundamental questions your Honor asked.

THE COURT: The things that I am perhaps more [108] interested in than anything else insofar as the arguments made by Mr. Mull and Mr. Spece are concerned have to do with those provisions of the release which, arguably, go beyond what was specifically spelled out in the settlement agreement. I am not saying that they do or they don't, but I would like to have the fractionators' response to whether they do or not and then, secondly, your response to the suggestion that if they do, this vitiates the class settlement.

MR. MAGAZINER: I think your Honor certainly knows what our bottom line response is. We think we still have a valid class settlement that your Honor is overseeing at this point.

We will be happy in our response to take Mr. Arceneaux's points point by point and any additional points that Mr. Spece made and respond why we do not think the release deviates in any material way from the settlement agreement or the notice that accurately described the settlement agreement.

THE COURT: All right. Then why don't you do that. And I will read Mr. Arceneaux's memorandum that was filed yesterday, and I will read what you file when you file it. Then if I want further oral argument, which I doubt, but if I do, I will arrange to set a date that is convenient for everybody.

MR. MAGAZINER: May we have perhaps five days after we receive the transcript?

[109] THE COURT: Well, yes. I think you will need longer than that.

MR. MAGAZINER: I am told I am being too ambitious. Two weeks after we receive the transcript.

THE COURT: All right, figure a week from now for the transcript, and two weeks thereafter, 21 days from now. So that would be—

MR. MAGAZINER: The 28th.

THE COURT: 28th, all right.

MR. MAGAZINER: Thank you, your Honor.

THE COURT:,Further memorandum.

Now, Mr. Shrager, do you wish to respond?

MR. SHRAGER: Well, first, if there is any question in particular, any area in particular, that you would like me to address, I would prefer to talk about what you want to talk about rather than what I want to talk about.

THE COURT: Well, I would like to hear your reaction, since you are representing plaintiffs, I would like to hear your reaction to my suggestion that there is something unfair to the fractionators about what Messrs. Mull and Spece are proposing here.

Now, you have not been someone who has been notably sympathetic to the fractionators throughout the life of the litigation, and I would be interested in your view of what I have described as their predicament.

[110] Is it a predicament or would it be a predicament if I should adopt the views of Mr. Mull and Mr. Spece, or would it instead be something that they have brought on themselves as is suggested?

MR. SHRAGER: Would there be a predicament for them? Certainly.

Would it be one from which they could obtain legal relief? Perhaps.

Did they get the benefit of the bargain they supposed under at least the landscape as painted by Mr. Arceneaux? Absolutely not.

There is a larger problem, though, that I have, sir. Class counsel are here today. Jim Green, Dianne Nast, and myself are here really representing a group of persons who would be in a state of uncertainty, the great majority.

There are about more than 5,000 sets of releases that have been mailed. You heard earlier that about 1,700 or 1,800 claims have been paid. Perhaps closer to 2,000 would be within the next week or so. We have an ongoing obligation to the class members, the majority of whom have not yet been paid then, who have releases in place.

Mr. Arceneaux's argument presumes that there are irrevocable offers of settlement out there. That may or may not be true. He did not explain what would be the legal constraint on the defendants for a settlement that is not part [111] of a class action settlement except he continued to—he called it an irrevocable offer. He said it was an offer. He called it a counteroffer. It is a very arguable point.

What are the legal rights of these people? Is there an offer, as he supposes, or would most observers or at least Courts say that if there is no settlement, there is no settlement either way? At least it should be admitted that these are very serious questions.

So the rights of the largest number of members of the class would be left with uncertainty. That is not satisfactory. There is not the slightest doubt that the agreement negotiated, approved, presented, drafted in great detail, including, we learned from Mr. Mull's time records, hundreds and thousands of hours that he himself says was put into this, was a class action settlement.

I mean, are we in Chicago? Is your name Grady? Is my name Shrager? This was a class action settlement.

Everybody knows that. And I do not shrink for one minute—perhaps the fractionators do—I do not—in supposing that somehow the Amchem case flaws this. I have never thought that. As a matter of fact, I think it fits like hand in glove because what Judge Posner said was that the order, he called it—I forget the phrase but I quote the Seventh Circuit—was usurpative because of three points, each one of which is definitionally obviated by the settlement, and that is number one. There [112] would be a jury of six or eight people who could reach this judgment and bankrupt the defendants, definitionally gone when you have a settlement.

He said, secondly, there would need to be an esperanto —he called it pejoratively—he said an esperanto definition. He did not recognize commonality or, for that matter, typicality in the respective issues of negligence and standard of care. He said nuances could be important. He said a lot of other things.

But they had to do with trial management issues, exactly what the United States Supreme Court said was important in terms of considering a settlement because you don't have trial issues when you have a settlement.

And, third, there was the 7th Amendment question, which was the other big ticket item in the Seventh Circuit's mind in the respect of a second jury re-examining the verdict of a first. In other words, how would you bring the case to a judgment on all issues?

It is precisely on that point, your Honor, that the United States Supreme Court modified, modified, the Third Circuit ruling and said settlement is pertinent and must figure into the equation of evaluating whether Rule 23 has been complied with.

So we concede nothing about Amchem. No one has—everyone has proceeded today. Of course, the fractionators

[113] have not had their say as yet on this. Everyone has proceeded as though we need to be defensive.

This Court approved a settlement within the four corners of the law as it existed at the time and as it existed after Amchem. But the important point was made by the Court earlier, and; that is, there is nothing in Amchem that says that a class action settlement is not worth the paper it is written on. If you have a claim against it, you appeal. You cannot lie and wait. You cannot stand silent when the rights of class members are at stake.

The reason for rules of appeal and time limits is so that the rights of parties can be settled. And at the district court level, there is a time limit because its decisions may be reviewed. There is no appeal that is pending, none, none. That is first principles. There is no appeal.

What are we talking about here? There are some arguments that were made that I am personally very sympathetic with, but we have an obligation to the class. And these issues were presented, they were argued about, an agreement was negotiated, and we are told again by Mr. Arceneaux's client that he, as much as anyone, was involved in the settlement, was one of the parents of the settlement.

And you recall, Judge Grady, when you asked Mr. Mull about what you had heard, that there were these town meetings, that he was undermining the settlement, he wrote to the Court [114] on March 5, 1997, and he described the background of the settlement, and he said that early April, referring to April of 1996, at which time members of the Steering Committee were brought in to finalize the details of the offer, these efforts ultimately culminated in the proposal which was formally presented to you, a proposal in which he tells us in these papers and in his affidavit he was conspicuously involved.

And then he continues—I am at the second page of his letter:

"As you may recall from my comments at the fairness hearing, my only reservation regarding the fairness of the settlement was that it be concluded in a timely fashion."

Now, the important point here is not whether in retrospect things could have been done differently, whether the offer crafted by the defendants was very clever in terms of setting the amount of the attorney's fee. I in part agreed with what the professor from Arizona had to say about that. I thought he made some astute points.

But the fact of the matter is that a deal was done and concluded and it was advertised and it was approved, and parties actively participated. Your Honor will recall that Chuck Kozak very vigorously participated in one of the fairness hearings on theories of liability that he thought had been neglected. It was a very formidable attack. I heard not a word about attorneys' fees.

[115] So these parties were involved to say they are not in front of the Court on jurisdictional issues, that lawyers who are practicing in a Court have filed MDL cases are not properly before the Court as to attorney fee matters. I don't think much of that, and I don't think the law thinks much of it.

So what about the release issue that you are concerned about? Here is the story, I think, your Honor. There is no significant disparity in terms of any prejudice to any particular number of clients. Mr. Arceneaux, I think, made an embarrassing mistake when he first told the Court that it didn't let people know that all viruses were being released. I would like to read it.

"The settlement class is defined as persons who are HIV infected including those HIV infected persons who are or were also infected with hepatitis or any other infectious agents allegedly transmitted by factor concentrate."

THE COURT: Now, that is in the notice?

MR. SHRAGER: That is right in the notice. I mean, that is bull's eye.

That is an embarrassment not to know that and to say that the release was misleading on that. But I take that to have been inadvertence.

Now, the question—the other question was the United States government. That is true. I believe the government after the fact said we want to release it. We are going to get [116] rid of our claim. We want two things. We want some money and we want a release. I believe there are two cases in the United States. We have spoken to counsel in one or both of them. Jim Green has spoken to both the lawyers. None of them are clients, to the very best of my knowledge, of Tom Mull's. None of them have claims. I didn't hear a representation of claims against the government. I heard a representation there were claims against the state of Louisiana perhaps.

Well, that has nothing to do with it. What are the real life illustrations of claims against clients that will be prejudiced under the terms of the release? Is the release too long, et cetera? Yes. It was obvious what was intended here. The defendants wanted to be protected. They wanted bullet proof protection. So they drew a release quite long, some might say detailed.

But the question before the house is not whether that is the case; the question is whether we jeopardize the rights of thousands of people who will be uncertain. We have explained on our 800 calls hundreds of times weekly —we are at it day and night, I assure you—we explain what the release means and what it doesn't.

Mr. Arceneaux says that, well, these people are calling and they are confused. There is an 800 number. That is what we are there for, and we answer—you know, we answer these calls all the time.

[117] What are they telling you? They say that what has been done here is—it is kind of a cafeteria approach.

So what the defendants have done, according to the argument, is this. For those who want to accept the settlement, there is an irrevocable offer. You get yourself 100,000. You get 100,000, and then we are going after you for our fees, $50,000 apiece.

THE COURT: How does it get to be $50,000, by the way? I am not sure I understand.

MR. SHRAGER: Well, the claim made by Mr. Arceneaux I believe to be $50,000 per case. On the premise that the total settlement would have been 150,000, a one-third fee would be 50, and the client would get a hundred.

Part of the cafeteria is this fee fund. You might be interested in knowing that Mr.—

MR. MAGAZINER: Mr. Arceneaux's claim is he has—Mr. Mull has a one-third contingent fee. And, therefore, in order to pay him one-third where you pay the client two-thirds—you say if two-thirds equals 100,000, what is one-third? That is another 50.

Mr. Spece's claim is for 66,000, as we understand it, because he does the same calculation on a 40 percent basis.

MR. ARCENEAUX: May I be allowed to say what my own claim is?

THE COURT: Yes.

MR. ARCENEAUX: My claim is by offering to the client [118] $100,000 net, you have in fact paid 150,000 because—it is not my claim. It is Lazlo v. State Farm Insurance Company, U.S. 5th Circuit 1986.

THE COURT: Thank you.

MR. SHRAGER: That is final.

Mr. Arceneaux is more reasonable in his contingency arrangements, but be that as it may, what is going on here is perfectly evident. What is going on here is no longer, your Honor, the community.

You remember these same folks came in on behalf of members of the community. The members of the community aren't here today. The lawyers are here. The lawyers are here about fees. And so they proceed with commendable candor, and they have already received, as I don't know if the Court is aware—from this cafeteria arrangement, they have already gotten costs back from the fee fund.

In other words, there is about $75-$80,000 in costs that Mr. Arceneaux has agreed to for—on costs on class action settlements. And they will continue to participate in the fund. So I don't know what their position is except if you don't like the settlement, you can sue them. If you do like the settlement, you can take it.

But we are in a Court of law. There was an order entered. There is a certified class, something called a certified class. It was never appealed. That is what people [119] are relying on out there.

THE COURT: What is your view of that provision in the release that says in substance that we are making our own independent determination here and we are not relying on the fairness finding?

MR. SHRAGER: My view of it is it is unnecessary. It shouldn't be in there. There is a bar order in place. If the fractionators need any further aid and comfort, to be sure, they enjoin the benefits of a bar order. I think they have it already from the Court's May 8th order. If they need more, fine. We understand what the deal was.

THE COURT: This was, as Mr. Spece acknowledges in one of his briefs, a hedge against Amchem, I guess.

MR. SHRAGER: That is exactly right.

I don't think it was necessary, but it was intuitive, and major corporations, you know, want to protect themselves from any contingency. So I think that is all that it was about. It was an effort to create a further layer of protection.

THE COURT: I want a response from the fractionators to the argument that that indicates that you really weren't proceeding with a class settlement.

MR. SMITH: Your Honor, I would point you to page 6 of the fractionators' combined reply that we filed I guess it appears on the 10th of November. What we explained there was [120] that this language simply was to protect us from a claimant signing the release, accepting the idea that there is a Walker class, spending the money, and then coming back and saying there isn't a Walker class.

What this language does is require the clamants to collect now. They can say, if they choose. I have read the Amchem decision. I don't think there is any longer a certified class. I am not going to sign your release, and I am going to bring a lawsuit.

We have told them if you do that, we will assert the bar order in that lawsuit. But we wanted to make clear that they cannot have it both ways. They cannot argue the invalidity of the lawsuit after they have taken our money and spent it.

THE COURT: What was the date of that Mull letter that you quoted, Mr. Shrager, a moment ago?

MR. SHRAGER: Yes, your Honor. I will be happy to—

MS. GOURLEY: March 5th.

THE COURT: March 5.

MR. SHRAGER: I would be happy to make it an exhibit. I assume we are going to be entitled to—

THE COURT: I think that ought to be an exhibit of—it should be part of somebody's recitation today.

MR. SHRAGER: I am assuming, your Honor, that we are going to be permitted to do that.

[121] THE COURT: As far as I am concerned, everything that has been submitted to the Court in connection

with the settlement is an approprite exhibit to today's hearing.

MR. SHRAGER: And just because someone could be looking at the record, in this submission, I see there was an affidavit. There was an affidavit—one of the exhibits—I have not yet received it, but Mr. Green showed me his copy—an affidavit of Mr. Mull which offers what perhaps all those except he and perhaps Mr. Kozak might see as a totally revisionist view of what the settlement was about, the history of the settlement, how it came into being.

There are massive misstatements made, and I am very concerned that because there has not been an opportunity to answer any of this yet, that affidavits have become part of the record.

Your Honor has not seen these papers yet evidently.

THE COURT: No, not if they are part of Mr. Arceneaux's latest filing.

MR. SHRAGER: Well, they are, sir. I just want you to understand that the recitation, the history of the settlement by Mr. Arceneaux and separately by Mr. Mull in an affidavit, somewhat inconsistent with Mr. Arceneaux's recitation, these are simply unilateral statements that they are making about the history of this. And we think in part they show a disregard to the oath. At least Mr. Mull's affidavit does. I just want you [122] to be aware of that, sir.

THE COURT: In what connection—

MR. SHRAGER: In connection—

THE COURT: —is the history of the settlement thought to be relevant to the pending motion?

MR. SHRAGER: It is not.

THE COURT: I thought by Mr. Arceneaux.

MR. SHRAGER: Well, he will have to answer why he thinks why it is relevant.

THE COURT: Yes.

MR. ARCENEAUX: Explaining the history of the settlement was relevant to explain how the conflict of interest problem was exploited by the defendants in crafting a settlement which approached—which was offered to Mr. Shrager when negotiations were ongoing with Mr. Mull who actually had clients. And the offer was made to Mr. Shrager, who had gone on record as saying he represented no clients except MDL plaintiffs.

That was the purpose of demonstrating that the negotiations were going forward with Mr. Mull and progressing satisfactorily.

At some point when the final offer was made, it was not made to Mr. Mull. I think—instead, it was made in the Wall Street Journal.

MR. SHRAGER: Yes.

[123] MR. ARCENEAUX: That was the context.

MR. SHRAGER: You are absolutely correct.

Your Honor, you will see, because Mr. Arceneaux—because Mr. Arceneaux did not participate in the events, he will not recall that your Honor directed me to send a letter, and which I enthusiastically wanted to send to people in order that they not rely on the continued tolling effect.

You will recall the time when there was decertification and there was an issue arose with respect to certiorari. My first step was to notify the outreach group that we had established to let them know that they must not rely on the class any longer as a tolling device and to seek counsel, which was, of course, what professionally we had to do, and the Court thought it was the right thing to do at the time. So I am not sure I know what that has to do with it, with anything.

But what I am concerned about in this history is that it reflects a pattern of conduct by Mr. Mull and his colleagues in operating behind the backs of the Steering Com-

mittee to discuss a settlement at a point in time when there were ongoing discussions with one of the major fractionators which financially would have redounded to greater benefit.

That is just a piece of history. But however we got there, there was a settlement offer made, and though it was in improper form initially, it was refined, it was negotiated, it [124] was accepted. There was a complaint filed. There was an agreement drafted. This Court has worked selflessly, as have many lawyers, in overseeing its implementation. And to trash it at this point would simply be the wrong thing to do.

I want to call your attention that in the papers filed by Mr. Arceneaux, he says that the end result of the present proceedings is, quote, that the settlement is plodding along toward finality but outside the jurisdiction of the Court. I regard these papers as being offensive.

And to have been part of a settlement and to claim thousands of hours of time, as Mr. Mull does, and to then come in and repudiate it and to say it is being repudiated because of a Supreme Court decision, and we knew about it and we ensnared them, we knew what may come down from the Supreme Court, and it did come down, we fooled them, we tricked them, we got you, and now you are stuck, it just doesn't sound right.

THE COURT: Thank you. All right.

MR. ARCENEAUX: One thing I have to get clear today.

THE COURT: Okay.

MR. ARCENEAUX: I have five short comments I would like to make about class counsel's remarks, but I really need to attend to this first because this is the business that I am really here for.

Mr. Shrager said members of the community are not here. That is not true. There was a motion filed by me on

[125] behalf of the Mull & Mull clients asking that the Court order the defendants to not withhold payment from Mull & Mull clients because of the fee dispute. That is the number one order of business. We must take care of that issue before we go any further.

I believe I understand your Honor to say you disagree with my position on that and you won't order them to do so. What I need—

THE COURT: Let me say this.

MR. ARCENEAUX: —is a statement on the record that they are not going to pay us, so I can go somewhere, to a state court, and get an injunction order or something, but I have got to get an order that I can either appeal or that I can take elsewhere.

If your Honor denies the request, that may give me an order to go to the Seventh Circuit for review, but I need to make sure these clients are protected, and I can't allow the defendants to continue to let us twist in the wind. There is a history there. I wrote them a letter saying you are not paying Mr. Spece's clients or you are going to not pay us. Please respond within 10 days or I assume you are not going to pay us. I got no response.

THE COURT: Here, I am going to save you some trouble, and maybe you will save us some trouble by appealing this order to the Seventh Circuit because that would put the fat in the [126] fire even earlier than an appeal from whatever order I enter at the end of the day here.

But I will include in today's order a provision that the fractionators are relieved from paying further settlement amounts to the clients of Mull, Kozak and Spece and Ibanez until futher order of Court.

Now, let me ask this in that connection. To what extent do the fractionators still have control over what payments are made and to whom?

MR. SMITH: Your Honor, first, I am not sure whether Mr. Kozak has in fact asserted a lien. I think we ought to clarify that.

THE COURT: All right. Somehow I always consider him as being part of the same—

MR. SMITH: I think there may be confusion on that, and I ought to clarify it.

THE COURT: I didn't even see Mr. Kozak until just this moment when he stood up.

Are you asserting any kind of a claim for attorneys' fees, Mr. Kozak?

MR. KOZAK: Mr. Arceneaux represents me also, your Honor.

THE COURT: I see.

MR. ARCENEAUX: A lien was filed by Mull & Mull because the contracts are Mull & Mull contracts. Mr. Kozak and [127] Mr. Mull have a fee sharing arrangement as co-counsel.

THE COURT: I see.

MR. ARCENEAUX: The majority of the contracts are Mull & Mull contracts. There are a few with Mr. Kozak's name on them. They are not signed by Mr. Kozak. So that is why the lien was filed by Mull & Mull.

MR. SHRAGER: Your Honor, in the form of order you enter, there could be—you meant in cases in which liens have been asserted, and I think in the—

You said—you made a statement that could be interpreted as meaning across the board, that you didn't wish payments to be made. I would object to that.

THE COURT: Well, I don't even know that the thing is limited to liens because, as I understand the argument, there are all sorts of theories. There are contract theories, there are tort theories.

MS. GOURLEY: We have been sued actually, your Honor.

MR. MAGAZINER: Mr. Arceneaux has informed us that he has sued us, the theory being that when we pay a client, if we do not pay Mr. Mull $50,000, we are acting tortiously.

So I think your Honor is correct that the order should be as to allow Mr. Mull's clients, Mr. Spece's clients, and, based on what Mr. Arceneaux said, Mr. Kozak's clients.

MR. SHRAGER: I would like to—

If I may inquire, how do we know that in a hundred [128] percent of the cases of persons who are represented by Mr. Spece or Miss Ibanez or Mr. Kozak or Mr. Mull that there have been legal claims asserted against—

THE COURT: Well, even if there haven't been to date on the basis of the presentation made today, it might be done tomorrow or next week.

MS. GOURLEY: Your Honor, may we propose a form of order on this? My concern is that the money paid in trust—we really don't. I am not sure how this order should be crafted.

THE COURT: I am not either. That is why I asked who has control of the payment.

MR. SMITH: Your Honor, under the trust agreement, once settlement counsel believes that a release is complete, the fractionators have a five-day period within which they can review the release.

And under the trust agreement, if they do not believe that the release is proper, they can tell that to the settlement counsel, in that case, the payment has been deferred. It has been on that basis that we have been deferring the payments to Mr. Spece's clients on the ground that the release that we bargained for was for peace, not only as to claims for damages, but also peace as to claims for attorneys' fees. We aren't getting that. Since we are not getting that, we are not paying.

[129] MR. ARCENEAUX: I think we ought to include the trust agreement in the record for the benefit of the Court of Appeals because I have never seen it. I don't have a copy.

THE COURT: You are getting it as far as the clients are concerned, aren't you? I mean, there is no claim by any client here that it—

MS. GOURLEY: That's not true, your Honor. The lawsuit filed by Mr. Arceneaux in St. Taminy Parish yesterday, which we got because it is an exhibit to his complaint, names a class member as a plaintiff who alleges emotional distress.

MR. ARCENEAUX: Might I explain who that is?

MS. GOURLEY: It requests punitive damages on behalf of the class member and on behalf of Mull & Mull based on my quick math.

MR. ARCENEAUX: May I explain to you about class members?

Your Honor may recall getting a call from Mary Harper. She notified you that her judge—the courthouse was named after him in St. Louis. She is the woman who—

THE COURT: Let me just say I don't take calls from anybody, but my secretary gets all kinds of calls. So I don't recall that call.

MR. ARCENEAUX: She was the woman who called —who the settlement administrator told her that in order to get her money, she had to fire Mull & Mull. That was the only way she [130] was going to get her check. That was an incident that occurred—when did that occur, Fran? In August.

THE COURT: Who told her that?

MR. ARCENEAUX: The settlement administrator.

MS. GOURLEY: I read that allegation to Mr. Higgins last night who said it was another falsehood.

MR. ARCENEAUX: We will try that in the appropriate Court and see what the facts prove. But that is the basis of why that class member joined that suit.

THE COURT: What is your suggestion, Miss Gourley, about an order?

MS. GOURLEY: What I would like to do, your Honor, is submit a form of order to the plaintiffs and to the Court and—

THE COURT: All right.

MR. SHRAGER: That would be better, I think, if you don't mind.

MR. ARCENEAUX: Could we ask that that be done within—

THE COURT: Yes.

MR. ARCENEAUX: We need to have certainty on these issues.

THE COURT: Try to do it by the end of the week.

MS. GOURLEY: Absolutely, your Honor.

MR. ARCENEAUX: Will your Honor agree to make the trust agreement a part of the record? I think it is important.

[131] THE COURT: I will make anything part of the record that anybody wants.

MR. ARCENEAUX: In order for me to do that, I need a copy.

MS. GOURLEY: After we get through, we would be happy.

MR. ARCENEAUX: That will be in a few minutes because I told you at the end of the hearing I would give you my copy.

MS. GOURLEY: Thank you.

MR. ARCENEAUX: So who would be responsible?

(Brief interruption.)

MR. ARCENEAUX: Now, on the other points raised, that was the major mission for me to accomplish today, and I think at least we have something on the record so now we know where we stand.

THE COURT: Before you proceed any further, Mr. Arceneaux, I am somewhat puzzled by a statement you made a moment ago.

You have submitted to the jurisdiction of this Court, you, Mr. Mull, Mr. Kozak, Mr. Spece, Miss Ibanez, to adjudicate a motion that you have filed having to do with this whole question of attorneys' fees. And I am going to rule on that motion, and I am going to rule on the competing motion of the fractionators.

Now, I think I heard you say that if you are dissatisfied with a ruling I make, you are going to go to some [132] other Court and seek relief.

MR. ARCENEAUX: I am sorry if I misinformed you. That's not our position at all.

Our position is this, and this is what is argued in the papers. A summary of the argument I think is what puts it forth most clearly. Our position is this Court has jurisdiction over two things: A $600 million fund that it can hold in its res—that it can hold under its auspices to make available to settlements who sign—to claimants who sign that release and get their settlements.

It also has jurisdiction over a $40 million fund. It may be called a cost and fee fund. It may just be $40 million sitting in a bank account that is no longer a cost and fee fund, but it is $40 million. It is a res, and it is in the jurisdiction of the Court.

In our response to the defendants' motion, we made a special limited appearance. We preserved—

THE COURT: There is no such thing in the federal court.

MR. ARCENEAUX: Well, the Graff case cited in our brief in the Seventh Circuit seems to indicate otherwise, an in rem proceeding. We can appear in an in rem proceeding when the only jurisdiction the Court has is over a fund and we can assert our right to the fund and the Court can adjudicate our right as to the fund.

[133] But what the Court doesn't have jurisdiction over is the rights that we may have outside of the fund. So what that means is your Honor is fully clothed with the authority to adjudicate our rights as to the $40 million. And that is not what the fractionators have asked you to do. They have not contested our right to share in the 40 million.

What they have asked you to do is enter a ruling adjudicating our rights outside of the $40 million, and that is what we believe your Honor doesn't have either the personal or the subject matter jurisdiction to do. So I realize there is a—it is a fine distinction, but it is clearly recognized.

THE COURT: The issue that you have presented to me for decision is whether you have a right to go outside the $40 million.

MR. ARCENEAUX: They presented the issue.

THE COURT: No, you have presented the issue because what you have said is there is no valid limitation upon our right to assert our rights under our contingent fee contracts.

Now, in order for you to reach that conclusion or for me to reach that conclusion, I would have to hold that you are not limited to the $40 million fund.

MR. ARCENEAUX: All you have to hold is that you have no jurisdiction to adjudicate that.

THE COURT: Just let me tell you that whatever order I enter that may be unfavorable to you is quite likely to [134] preclude any further litigation of the ques-

tion of whether the fractionators can be held liable for more attorneys' fees on any theory whatsoever, contract—

MR. ARCENEAUX: Tort, unjust enrichment.

THE COURT: —tort or other theory you are thinking of asserting in some other Court.

You can't come in here and take a small bite and reserve the rest of the meal for some other venue.

MR. ARCENEAUX: I understand. I only want to point out for your Honor that we did not take the bite. They hauled us in here on this motion, and I am only appearing by way of defense. We did not—we did not come into this Court and affirmatively invoke its powers to get relief.

THE COURT: I don't know the sequence of who filed what.

MR. SPECE: Your Honor, on this point I just want to make clear, we have tendered—Rose Ibanez and Roy Spece have tendered jurisdiction, whether it exists or not. We have requested this Court to take jurisdiction, give us discovery on all of our theories, but we would feel that any adjudication without discovery and a hearing would be a gross denial of due process of law.

THE COURT: Okay.

MR. ARCENEAUX: That is the only other point I want to make. I agree with that totally.

[135] There seems to be a lot of discussion about whether the representations of fact I made are true and the affidavits are accurate. I think if those issues are important to your Honor, then it is appropriate to grant Mr. Spece's request and that at some point we may have to have an evidentiary hearing to resolve any factual disputes.

In that regard, here is the March 5th letter. I will be happy to make a copy of the letter because I don't think there is anything—

THE COURT: I am sure I have one in chambers because it is among those.

Is the March 5 letter—did that go to everybody or was that part of the exchange?

MR. MAGAZINER: That was a letter to your Honor.

MR. ARCENEAUX: It wasn't submitted to the defendants.

MR. MAGAZINER: Your Honor, to be absolutely clear in response to what Mr. Arceneaux has just said, it is not the fractionators' position that your Honor needs to—that the factual matters we wish to place in the record in response to the things that Mr. Arceneaux and Mr. Spece have said are necessary to your Honor's decision. We agree with what Mr. Shrager said.

Your Honor can decide these issues, whether there is a valid lien, whether there are claims for money beyond the $40 million without regard to any of the facts that Mr. Arceneaux [136] has thought necessary to put in his brief, Mr. Mull has put in his affidavit, or that have been spoken in Court.

We just would like in fairness an opportunity to correct the record in that regard, but we think your Honor can make a ruling without relying on those factual representations one way or the other, and I believe I speak for Mr. Shrager in that regard as well.

THE COURT: All right, Court stands in recess.

(Which were all the proceedings had in the above entitled cause on the day and date aforesaid.)

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MDL-986

No. 93 C 7452

IN RE FACTOR VIII OR IX
CONCENTRATE BLOOD PRODUCTS LITIGATION

Cases No. 94 C 2655
94 C 2727
94 C 2728
94 C 5975
94 C 5815

JOHN DOE AND JANE DOE
JANE DOE
JANE DOE AND JOHN JOE,
JANE DOE,
T. DOE,

Plaintiffs,

v.

MILES INC., *et al.*,

Defendants.

CERTAIN ARIZONA PLAINTIFFS' RESPONSE TO MOTION FOR PRELIMINARY FAIRNESS FINDING AND REQUEST FOR THREE BUSINESS DAY EXTENSION TO ALLOW MORE COMPLETE RESPONSE

Certain Arizona Plaintiffs represented by the undersigned counsel in both state and federal cases hereby respond to the pending Motion for Preliminary Fairness Finding and request that the Court allow three additional business days (i.e., until August 19, 1996) for further response.

These Plaintiffs understand and appreciate that: (1) all parties have been working feverishly to achieve a global settlement; and (2) their counsel have been kept abreast of developments. However, as of this moment, neither these plaintiffs nor their counsel have seen either a final version of the proposed settlement or a final version of the proposed class notice. Although plaintiffs' MDL lead counsel graciously offered to share these in Chicago the evening prior to the August 14, 1996, hearing, the mere prospect of viewing the documents at such a late time does not justify another trip to Chicago in the midst of plaintiffs' counsels' virtual daily deposition schedule and discovery schedule in the Arizona state court hemophilia/HIV/AIDS cases.

In the event that the Court is not willing to entertain any delay (even when such delay might moot comments below by undersigned counsel), these plaintiffs wish to place on the record that the settlement agreement and notice drafts they have seen or been informed about are unfair in that they do not provide for or contain the short reference to the Arizona class litigation described in Exhibit "A" hereto (which is a copy of the Motion for Reconsideration, or Alternatively, Motion for Order Di-

recting Notice To Potential Plaintiffs in Arizona) or otherwise apprise Arizona victims that they have substantial potentail claims against health care provider defendants.

Moreover, plaintiffs wish to lodge an objection to the defendants' probably unethical, in effect, stipulation to the amount of costs and fees, thereby potentially driving a wedge between filed and unfiled cases and certain victims and their attorneys. Plaintiffs waive this objection, but note that the proposed settlement can ultimately be found fairly only if: (1) all legitimate costs, which by Arizona law must be paid by the clients, are awarded; and (2) the Court assures that the probable burden of inadequate fees is spread evenly among all the attorneys based on certain criteria commonly applied in attorneys' fees adjudications, including the honoring when possible, of contracts between counsel and clients in state court litigation.

Finally, the plaintiffs make explicit that: (1) they oppose any injunctions on cases in which the plaintiffs and their attorneys immediately opt-out or announce they will opt-out the moment a settlement class is certified (and denying that the Court has the power to issue any injunction in state court cases); and (2) they have been assured that no such injunctions will be sought.

RESPECTFULLY SUBMITTED this 13th day of August, 1996.

/s/ Rose Marie Ibáñez
ROSE MARIE IBANEZ

Supreme Court, U.S.
FILED
MAR 24 1999
OFFICE OF THE CLERK

No. 98-1242

In The

Supreme Court of the United States

October Term, 1998

MULL & MULL, PLC,

Petitioner,

v.

RHONE-POULENC RORER, INC.;
BAXTER HEALTHCARE COMPANY;
ALPHA THERAPEUTIC CORPORATION; and
BAYER CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF

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REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

1. The Opposition's contention that the Fractionators were "bushwhacked" is false. It is true that Mull and Mull did not file an opposition to the settlement, because it could not do so and honor its ethical duties to the three hundred and fifty of its clients that wanted the settlement. One attorney – James Carney – did file an opposition raising the probable illegality of the settlement, to which the Fractionators responded by asserting the opposition was a breach of his ethical duties. See Cert. Petition at 28. After the settlement was approved, more than 20 "class" members appealed, asserting that the settlement was prohibited by *Amchem*. Their appeals were settled in exchange for the Fractionators' decision to allow them to exit the class. On August 15, 1997, Mull and Mull gave notice of its assertion of a lien, based on its view that *Amchem* and the Release had transformed the "class" action into an amalgamated collection of individual settlements. See Cert. Petition, at 9. Only thereafter, on August 29, 1997, did the Fractionators finally and irrevocably commit themselves to going forward. It was on that date that they funded the Metropolitan Life Irrevocable Trust, in a trust agreement that expressly stated that it was not created pursuant to or in furtherance of any court order or judgment – a statement that was candidly honest in light of the Release's disavowal of the "class action" fairness finding. *See id.* at 9-10. And, while Mull and Mull's lien rights were being litigated, the Fractionators "voluntarily" agreed to continue to pay clients, even though they were relieved from the legal obligation to do so by Court judgment, with the end result that the 6000

claims were all settled and paid after this attorney fee dispute erupted. In fact, most of those claims were hurriedly processed and paid while this fee dispute was pending on appeal, after the Fractionators decided to expedite the payment process by waiving many of the procedural requirements they had previously imposed, such as the opening of estates. Given this history, the Fractionators' contention is absurd, if not insulting to the intelligence of this Court. This "class" action was a calculated gamble from start to finish. When *Amchem* was handed down, the Fractionators must have decided to go forward, because the benefit they hoped to receive justified the risk. For the most part, the Fractionators have gotten what they paid for – 6000 claims were resolved for the relatively cheap price of $100,000 per claim, even though some of those claims undoubtedly possessed more merits than others.[1] The Fractionators' feigned righteous indignation is persuasive argument, but it masks the careful risk benefit considerations that went into their settlement strategy, from achieving litigation

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[1] The benefit achieved by the Fractionators is underscored by events of last week. In Louisiana, an Orleans Parish Civil District Court jury awarded the surviving parents of a deceased hemophiliac $35,300,000 in compensatory survival and wrongful death damages for the loss of their son and his pain and suffering prior to death. Not only did the jury find that the Fractionators were liable on the grounds of strict products liability and negligence, but it also found that two of them (Cutter and Alpha) were guilty of fraud. The district judge subsequently dismissed the case on the ground of statute of limitations, which decision will be appealed. But, the clear message delivered by the jury regarding the merits speaks volumes about the payoff realized by the Fractionators through their $100,000 settlements.

class decertification in *Wadleigh* to sponsoring and administering a settlement-only class in the face of *Amchem*.

2. In an obvious attempt to scare this Court away from this case, the Opposition argues that the issue at hand is whether the settlement of over 6000 "class" members is "void," a conclusion that the Fractionators assert is not worth reaching because it is raised only for the benefit of lawyers. However, protecting the lawyers' state created and protected property rights will not cause the sky to fall. Whether the settlements individually confected by the "class" members are "void" is not an issue before this Court, and cannot be an issue insofar as it relates to those persons who signed the Release. See Release, paragraph 14, at App. 101. What is at issue in this case is whether the Fractionators are entitled to have the Petitioners enjoined from pursuing state court litigation to enforce their attorneys fees liens. The injunction that prevents this result seeks to enforce a federal judgment that could never have been issued but for the false and fraudulent "class action" petition filed by the Fractionators and the Steering Committee in order to invoke nationwide federal jurisdiction where it was clearly lacking, but was nonetheless necessary to the success of a plan to use a "class action" to cap liability for fees and shift the limited fees from "hometown" lawyers to Steering Committee members. The Fractionators admitted that the purpose of the "class action" charade was to arm the Court with the putative power to implement the "attorney fee" portion of the settlement. See Cert. Petition at 5. In addition to the lawyers – the admitted target of the "class action" plan – reversal of the injunction would also benefit "class" members who have not signed the Release

– persons who have not yet been paid. However, as to those persons who have signed and received their checks – over 6000 in number – nothing that occurs as a result of the instant dispute affects their rights, unless and until the Fractionators sue them to undo the settlement effected by the Release. If they do, the warranty clause of the Release which states that it is being concluded as an "individual" settlement, unrelated to the "class action," will protect their rights.

Respectfully submitted,

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